United States Court of Appeals

for the Second Circuit

APPENDIX

NO. 76-4278

United States Court of Appeals

FOR THE SECOND CIRCUIT

REA EXPRESS, INC., BANKRUPT,
C. ORVIS SOWERWINE,
TRUSTEE IN BANKRUPTCY,
Petitioner,

v.

UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION,
Respondents.

JOINT APPENDIX

VOLUME III

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Respondents.

JOINT APPENDIX

VOLUME III

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BEFORE THE
INTERSTATE COMMERCE COMMISSION

No. MC-C-8862
BRADA MILLER FREIGHT SYSTEM, INC. v.
REXCO, INC., AND REA EXPRESS, INC.

No. MC-C-8864
SCHNEIDER TRANSPORT, INC. v. REA EXPRESS, INC.

No. MC-C-8867
AMERICAN TRUCKING ASSOCIATIONS, INC. v.
REA EXPRESS, INC.

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No. MC-66562 (Sub-No. 2345) (Part No. 181)
REA EXPRESS, INC. - PETITION OF
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FOR DISMISSAL OF APPLICATION

No. MC-66562 (Sub-No. 2308TA)
REA EXPRESS, INC. - PETITION OF
AMERICAN TRUCKING ASSOCIATIONS, INC.,
FOR CANCELLATION OF TEMPORARY AUTHORITY

MOTION OF INTERVENOR, ALLTRANS EXPRESS
U.S.A., INC. TO STRIKE COMPLAINANTS' BRIEF, OR
IN THE ALTERNATIVE, CERTAIN PORTIONS THEREOF

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Dated: October 26, 1976

BEFORE THE
INTERSTATE COMMERCE COMMISSION

No. MC-C-8862
BRADA MILLER FREIGHT SYSTEM, INC. v.
REXCO, INC., AND REA EXPRESS, INC.

No. MC-C-8864
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U.S.A., INC. TO STRIKE COMPLAINANTS' BRIEF, OR
IN THE ALTERNATIVE, CERTAIN PORTIONS THEREOF

Comes now Intervenor, Alltrans Express, Inc., and pursuant to Rule 4 of the Commission's General Rules of Practice, respectfully requests the Commission (1) to strike the Brief of Complainants, or in the alternative, (2) to strike certain portions designated below.

I.

It has been amply demonstrated in Intervenor's Initial and Reply Briefs, that Complainants have consistently injected issues in this proceeding

which are not proper subjects of the Complaints. The cases cited in the Reply Brief make it clear that this Commission, throughout its history, has limited complainants to the issues specifically raised in their complaints. It has been noted that there is no lawful issue with respect to the revocation of all of the authorities of Defendant REA Express, Inc.; there is no lawful issue as to the unfitness of Defendant or as to the alleged willful and wanton violations of the Act; there is no lawful issue as to alleged violations of leasing regulations; there is no lawful issue as to alleged violations of the safety regulations of the Department of Transportation.

Because there are so many extraneous issues improperly injected in this proceeding by Complainants, and because Defendant, and therefore Intervenor, have been deprived of due process as to lack of notice in a case which attempts to destroy the entire operation of the Express Company, the entire brief of Complainants is subject to attack. It is doubtful whether a Court of Appeals would uphold any decision based upon the numerous allegations of law and fact which are not even properly before this Commission based upon the complaints filed. The matters which are improperly before the Commission so taint those which properly are in issue, that there would be no clear record basis for a decision.

It must be remembered that Complainants' brief begins with a prayer to revoke all temporary authority of Defendant, it makes that request throughout its brief, argues it at length, and concludes with such a prayer. The revocation argument -- which has never been properly in issue here -- so pervades the entire brief as to render any argument on lawful issues meaningless.

Indeed, it is difficult to read the brief without believing that the revocation issue is the overriding issue for the Commission to decide. Inasmuch as the issue of revocation of all temporary authorities is not properly before this Commission, and because the brief cannot be read intelligently without the injection of such improper issue, the brief should be stricken in its entirety.

We respectfully submit that the entire brief, being so encumbered by extraneous matters, should be stricken from this record.

II.

In the alternative, it is respectfully requested that the following portions of Complainants' initial brief be stricken: 1/

(a) Intervenor moves to strike all portions of Complainants' brief dealing with the argument that the Commission should summarily revoke all temporary authority issued to REA Express, Inc. Complainants did not request this Commission to revoke all of the temporary authorities held by Defendant. No complaint sought revocation of any temporary authority. Incredibly, Complainants begin their brief by praying "that the Commission exercise its jurisdiction and summarily revoke all temporary authorities issued to REA Express, Inc." (p. 1). Complainants end their evidentiary section by again asking the Commission to immediately revoke all outstanding temporary authorities of REA (p. 12). At pages 63 through 66, the Complainants set forth argument supporting their request that relief, not even prayed for in the complaints, be granted.

1/ Intervenor respectfully renews its objections made to each of the following, and considers such objections preserved for the record, along with all others made in this proceeding, for purposes of appeal.

Even Complainants admit they "did not spell out this relief in their complaints" (p. 64). Intervenor has set forth in its reply brief cases demonstrating that this Commission has consistently, even long before the Motor Carrier Act, held complainants to the proof based upon the allegations in their complaints. It would be an incredible situation if the Commission should now grant relief on a matter of which Defendant and Intervenor never had notice. Commission decisional law and all Federal law, of which Intervenor is aware, holds a plaintiff to those matters alleged in his complaint as originally filed or lawfully amended. We ask nothing more and move that the matter be stricken.

(b) Intervenor moves that all matters contained in the brief referring to the unfitness of Defendant and its alleged willful and wanton violations be stricken. Intervenor adopts the argument set forth in (a) above with respect to a lack of notice and, therefore, due process, inasmuch as this matter is not alleged in the complaints.

Complainants' brief is so filled with allegations of wrong doing on a matter not alleged in the complaint, nor, in most instances squarely based on facts of record, the entire brief is tainted. The alleged unfitness of REA is not properly before this Commission in this proceeding. These Complainants alleged certain operations outside the scope of the operating authority held by Defendant and asked for an order requiring Defendant to cease and desist from such operations. We believe that the operations complained of are only those specified. This is not a proceeding to determine the fitness or unfitness of Defendant. Yet, Complainants begin as early as page 12 and continue thereon

alleging the unfitness of Defendant. This is another of the many extraneous matters which fill the brief of Complainants, on matters not properly brought before the Commission, which serve only as an attempt to bolster Complainants' otherwise weak evidentiary presentation relating to matters which are properly in issue.

(c) Intervenor moves to strike all matters concerning alleged violations of the Safety Regulations of the Department of Transportation which are found primarily at pages 54 through 62 of the brief.

Again, Intervenor adopts its original argument as to matters not contained in the complaints, and the attendant due process arguments. Enforcement of the Safety Regulations of the Department of Transportation , lies with that Department, not the Commission. Not only were such matters not alleged in the complaints, but no evidence was presented to show that the Department ever agreed with Complainants' allegations, much less that the Trustee has been found guilty of any violation. The testimony of the Safety Director of American Trucking Associations, Inc. is not only irrelevant, was not within the complaints, and is, in any event, de minimis. That testimony found, in Appendix 24 to Exhibit 1 – which we also ask to be stricken -- is supposedly bolstered by its "Attachment A" showing minimal violations in the opinion of the witness. Complete cross-examination was not allowed (Cf. Tr. 1883). However, it should be noted that the attachment is so filled with errors and already stricken material that it is of no probative value, is irrelevant, and should be stricken. As an example, of 39 pages in the attachment, no fewer then 46 items of alleged violations were stricken because they were in error, along with the entire page 8 of the attachment.

Therefore, not only is the issue of safety regulations improperly before this Commission, but the testimony with respect thereto has been shown to be so error filled and worthless to a disposition of this or any case, the matter should be stricken.

(d) Intervenor moves to strike all matters relating to the alleged violation of the Commission's Leasing Regulations. Not only are the matters argued at pages 46 through 53 irrelevant as not being properly brought before this Commission, but, as a matter of law, should be stricken for yet another reason. 49 CFR § 1057.3(b) specifically exempts from the Leasing Regulations equipment used wholly or in part of the transportation of railway express traffic. Complainants may seek to distinguish the operations of Defendant from that exemption, but such attachments must fail. If the Commission were not referring to traffic transported by REA Express, Inc., then we must ask to what did it refer. It seems obvious that REA has been, and is exempt from the Leasing Regulations. Therefore, this extraneous matter should be stricken as a matter of law, and also because it is not properly before this Commission, and its inclusion and consideration thereof violates due process principles.

WHEREFORE, it is respectfully prayed that the Commission strike the initial brief of Complainants in its entirety, or in the alternative, to

strike the portions designated in II above, and to grant such other relief as it may deem just and proper.

Respectfully submitted,

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Dated: October 26, 1976

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 1976, a copy of the foregoing Motion of Intervenor, Alltrans Express U.S.A., Inc. was served on all parties of record by First Class mail, postage prepaid.

J. William Cain, Jr.

CI 124

Before the
INTERSTATE COMMERCE COMMISSION
Washington, DC 20423

No. MC-C-8862
BRADA MILLER FREIGHT SYSTEM, INC. v. REXCO, INC. and
REA EXPRESS, INC.

No. MC-C-8864
SCHNEIDER TRANSPORT, INC. v. REA EXPRESS, INC.

No. MC-C-8867
AMERICAN TRUCKING ASSOCIATIONS, INC. v. REA EXPRESS, INC.

No. MC-C-8874
ASSOCIATED TRUCK LINES, INC. ET AL. v. REA EXPRESS, INC.

No. MC-66562 (Sub-No. 2345) (Part No. 181)
REA EXPRESS, INC. - PETITION OF AMERICAN TRUCKING ASSOCIATIONS, INC. FOR DISMISSAL OF APPLICATION

No. MC-66562 (Sub-No. 2308 TA)
REA EXPRESS, INC. - PETITION OF AMERICAN TRUCKING ASSOCIATIONS, INC. FOR CANCELLATION OF TEMPORARY AUTHORITY

REPLY TO MOTION TO STRIKE

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NOVEMBER 1, 1976

Before the
INTERSTATE COMMERCE COMMISSION
Washington, DC 20423

No. MC-C-8862
BRADA MILLER FREIGHT SYSTEM, INC. v. REXCO, INC. and
REA, EXPRESS, INC.

No. MC-C-8864
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REA EXPRESS, INC. - PETITION OF AMERICAN TRUCKING ASSOCIATIONS,
INC. FOR CANCELLATION OF TEMPORARY AUTHORITY

REPLY TO MOTION TO STRIKE

COME NOW Complainants and Petitioner in the above-entitled proceeding and file their reply to the "Motion of Intervenor, Alltrans Express U.S.A., Inc. to Strike Complainants' Brief, or in the Alternative, Certain Portions Thereof." It is Complainants' position that Intervenor's Motion, which is unsupported by any authority, should be denied.

Alltrans asserts (Motion, p. 3) that "the issue of revocation of all temporary authorities is not properly before the Commission." This assertion confuses the "issues" with the "relief" sought by Complainants and is without merit.

The issue raised by Complainants is whether the operations conducted by Rexco are lawful under authorities specifically limited to the rendition of express service. If the Commission finds that the ordinary freight service over irregular routes conducted by Rexco is unlawful and not authorized, the Commission may, regardless of the relief initially sought by Complainants, revoke REA's temporary authorities. REA was put on notice when it received its temporary au horities that a failure to comply with the terms and conditions thereof would subject them to summary revocation[1/] without notice. Since temporary authorities are not licenses, the Commission may, upon finding that Rexco has not complied with the express limitation in those temporary authorities, summarily revoke them without notice and without another chance. See Great Lakes Airlines, Inc. v. Civil Aeronautics Board, 294 F.2d 217 (1961), cert. denied, 366 U.S. 965 (1961). In any event, Complainants, in addition to asking for a cease and desist order, requested the Commission to issue "such other and further order or orders . . . as the Commission may consider proper in the premises." Clearly, the entry of an order revoking all temporary authorities for failing to render express service pursuant thereto and for failing to maintain compliance with statutory and Commission requirements would fall within Complainants' requested relief.

1/ As this shows, the Commission does not have to find that REA is unfit before revoking temporary authorities. It need only find that it has failed to comply with the conditions listed on the temporary authority itself.

Alltrans' further contention (Motion, p. 3) that "the alleged unfitness of REA is not properly before this Commission in this proceeding" is equally wide of the mark. Apparently, this contention is based on Complainants' failure to allege specifically in their complaints that "REA is unfit." A broad reading of the complaints, however, leaves absolutely no doubt that Complainants have specifically charged REA with failing to comply with its certificates, the provisions of the Interstate Commerce Act, the many cases involving the Commission's interpretation of REA's authorities and Commission regulations. In other words, Complainants have across-the-board challenged REA's operations. If the Commission decides that such failures are a reflection of "unfitness," it may do so. That Complainants did not allege that the net effect of the alleged violations would compel a finding of unfitness is immaterial. As correctly recognized by Judge Beddow, Tr. 778-779, "[a]s far as the Commission is concerned, fitness is always an issue that the Commission itself may recognize." The Commission, based on the evidence of record, may properly find that REA, by not operating in a manner that is consistent with the public interest, the public safety and the terms and conditions of its certificates and temporary authorities, and by embargoing all small shipments and liquidating its equipment and facilities, is operationally unfit. The Commission in the discharge of its regulatory function is free to consider the facts and enter appropriate findings. It is not tied to the archaic forms-of-action type pleading requirements that Respondents would impose.

Alltrans further seeks (Motion, p. 5) to strike all reference to Rexco's safety violations. Alltrans fails to grasp the significance of this evidence. Complainants are not seeking a Commission finding that Rexco has violated the Safety Regulations of the Department of Transportation.[2/] Rather, Complainants contend that this evidence goes to the question of the absence of control exercised over Rexco owner-operators and to questions of REA's fitness and ability to conduct safe highway operations.

In addition, it should be remembered that Rexco and Alltrans had a full opportunity to rebut this evidence or to justify its violations of law. This they failed to do. To now argue that Complainants cannot discuss this damaging testimony is patently absurd.

Alltrans lastly (Motion, p. 6) moves to strike all matters relating to the alleged violations of the Commission's Leasing Regulations. This requires a two-part answer. First, the evidence of Rexco's failure to inspect leased vehicles, which does not fall within the "express" exemption, was initially introduced in response to a question asked by Judge Beddow (Tr. 238-239). The Respondents, as the Transcript shows, did not object. Instead, they proceeded to cross-examine Mrs. Campbell (Tr. 253-254, 274-275) about this point and did not move to strike her testimony concerning the failure to inspect the leased equipment. Nor did they attempt to rebut this

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2/ If Alltrans desires, Complainants will be glad to forward this evidence to the Department of Transportation for its perusal.

evidence by introducing, for example, the testimony of her direct employer, Mr. John Smith, who represented himself to Mrs. Campbell as Rexco's Midwest Manager.

Second, the question of the commodities that can be lawfully handled by REA is clearly raised by the complaints. Since the leasing exemption is limited to vehicles used in the transportation of railway express traffic, it necessarily follows that REA's deliberat failure to limit its holding out to express traffic deprives it of any right to hide behind this exemption. In any case, this question involves a legal issue that is properly advanced on brief and it not the proper subject of a motion to strike.

As the above shows, there is absolutely no merit to Respondents' unfounded claim that Complainants have improperly injected extraneous issues into this proceeding. The issues discussed in Complainants' briefs are clearly related to the question of whether the Rexco operation can be lawfully conducted under the REA authorities. Thus, the cases relied upon by Respondents in their Reply Brief, which are incorporated by reference in the motion to strike, are inapposite to the instant proceeding.

Furthermore, Respondents' position, which would limit Complainants' evidence to those matters specifically mentioned in the complaint, is contrary to the modern concept of pleading which recognizes that the propriety of a pleading is today judged by its effectiveness as a mechanism for giving an adverse

claim that the issues raised in hearing came as any great surprise.

Furthermore, the Commission has not followed the restrictive approach advocated by Respondent, but rather has adopted the broader modern view expanded by the Third Circuit. See, e.g., Federal Highway Administration v. Safeway Trails, Inc., 113 M.C.C. 815, 822-823 (1971); Mushroom Transportation Company, Inc., v. Midwest Emery Freight System, Inc., 94 M.C.C. 51, 54 (1963).

Finally, it should be noted that Respondents' narrow position is rejected by the Rules of Civil Procedure which permit the amendment of pleadings even after entry of judgment. See Fed. Rule Civ. Proc. 15(b). Respondents' position, which is tantamount to the imposition of the archaic forms of action, should be rejected.

Complainants respectfully submit that Respondents' repeated assertions of a denial of due process are without merit. The complaints, which were filed over nine months before the hearing, set forth in considerable detail the Complainants' allegations concerning the perceived unlawfulness of the Rexco operation. In addition, the Complainants during the course of discovery provided REA with a copy of every scrap of paper that they copied. Furthermore, it should be observed that REA alone had free access to all of its files and employees, both past and present, including those with an intimate knowledge of the Rexco operations. As a result

of the Commission's Order served July 28, 1976, REA not only was provided with the Complainants' argument and with the bulk of their direct evidence, but it was advised over a month ahead that it would be required to present its case following completion of the Complainants' presentation. In short, the Commission's handling of this proceeding reflects full due process to all parties. Respondents' failure to take advantage of the substantial amount of time between the filing of the complaints and the completion of Complainants' presentation to prepare their defense was a voluntary decision with full knowledge of all the facts and issues now before the Commission.

Complainants respectfully request the Commission to deny the motion to strike filed by Alltrans.

Respectfully submitted,

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NOVEMBER 1, 1976

CI 125

INTERSTATE COMMERCE COMMISSION

SERVICE DATE

NOV 19 1976

No. MC-C-8862 1/

BRADA MILLER FREIGHT SYSTEM, INC., v. REXCO, INC. AND REA EXPRESS, INC.

Decided November 17, 1976

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1. In the complaint proceedings, defendant found to be engaged in described operations beyond the specific scope of its certificates and its temporary authority. Cease and desist order entered.

2. In the petition proceedings, the permanent application found not to have been appropriately prosecuted and good cause found for termination of the temporary authority, and the permanent application dismissed and the temporary authority revoked.

John W. Bryant, Wallace N. Nations, Todd A. Peterman, Gary W. Sawyer, Richard H. Streeter, and Daniel C. Sullivan for complainants, petitioners, and intervenors in support of the complainants and petitioners.

John M. Cleary, John K. Maser III, and Donald L. Wallace for the defendant-applicant.

Bernard A. Gould and Michael N. Nafpliotis, for the Bureau of Enforcement, Interstate Commerce Commission

J. William Cain, Jr., and Robert R. Redmond for intervener in opposition to relief requested.

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

Due and timely execution of our functions under section 17 of the Interstate Commerce Act imperatively requires the omission of the Administrative Law Judge's initial decision. Requested findings not discussed in this report nor reflected in our findings have been considered and found not justified or their resolution not necessary for the appropriate disposition of these proceedings.

1/ This decision also embraces No. MC-C-8864 Schneider Transport, Inc. v. REA Express, Inc., No. MC-C-8867 American Trucking Associations, Inc. v. REA Express, Inc., No. MC-C-8874 Associated Truck Lines, Inc., et al v. REA Express, Inc., No. MC-66562 (Sub-No. 2345) (Part No. 181), REA Express, Inc. - Petition of American Trucking Associations, Inc., for Dismissal of Application, and No. MC-66562 (Sub-No. 2308 TA), REA Express, Inc. - Petition of American Trucking Associations, Inc., for Cancellation of Temporary Authority.

By separate complaints filed November 25, 1975, November 26, 1975, December 5, 1975, and December 11, 1975, respectively, Brada Miller Freight System, Inc.; Schneider Transport, Inc.; American Trucking Associations, Inc.,; and Associated Truck Lines, Inc., et al.,[2/] seek a cease and desist order against alleged unlawful operations of RFA Express, Inc. In addition, by petition filed December 1, 1975, the American Trucking Associations, Inc. seeks dismissal of the application designated as MC-66562 (Sub-No. 2314) and for cancellation of MC-66562 (Sub-No. 2308TA).

By order of April 5, 1976, these proceedings were designated for handling on a consolidated basis and certain provisions for discovery were made. By order of April 14, 1976, the Bureau of Enforcement of this Commission was directed to participate in the complainant proceedings for the purpose of developing the record. By order of July 28, 1976, the Commission prescribed special rules for the submission of evidence and referred the matter to an Administrative Law Judge for hearing. Appropriate statements were filed by the complainants and petitioners (hereinafter generally referred to as complainants), one week prior to the start of the hearing and hearing was held on a consolidated record at Washington, D.C., commencing on August 30, 1976, and extending through September 22, 1976. At the hearing, Alltrans Express, USA, Inc., was allowed to intervene in opposition to the relief requested. At the close of the hearing October 18, 1976, was set as the brief date. Also, a filing date of October 25, 1976, was established for the submission of reply briefs. By notice served October 15, 1976, the Commission announced that it would expedite the processing of these proceedings by dispensing with the Administrative Law Judge's initial decision and by issuing a report of the Commission. Briefs and reply briefs were timely filed by all parties. The record has duly been certified to the Commission by the Administrative Law Judge with the observation that: "The statements and demeanor of all witnesses testifying at the hearing did not demonstrate any instance which would subject the credibility of such witness to question."

CONTENTIONS OF THE PARTIES IN POST-HEARING BRIEFS

INITIAL BRIEFS:

Complainants maintain that the defendant has willfully and otherwise breached its obligation to render a service which is validly consistent and reasonably commensurate with the scope of its express service authority. They contend, for example, that through tariff restrictions, REA's Rexco division does not hold itself out to transport either commodities requiring special care in handling or lighter-weight shipments, both of which services are basic indicia of express

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2/ Other specific complainants or interveners represented at the hearing were: Allegheny Corporation doing business as Jones Motor; Artim Transportation System, Inc.; Associated Transport, Inc.; B&P Motor Express, Inc.; Eastern Express, Inc.; George Transfer and Rigging Company; Great Lakes Express Company; Holland Motor Express, Inc.; Home Transportation Company, Inc.; Interstate Motor Freight System; Jones Transfer Company; Kaplan Trucking Company; Long Transportation Company; McLean Trucking Company; Ryder Truck Lines, Inc.; Earl C. Smith, Inc.; Strickland Transportation Company, Inc.; United Trucking Service, Inc.; and U.S. Truck Company, Inc.,Consolidated Freightways Corporation, a protestant in the original sub 2345 proceeding, also made an appearance at the hearing.

service. Complainants contend that, on the other hand, Rexco actively solicits traffic which is not susceptible to transportation in van-type trailer equipment and that it provides call-on-demand and irregular-route services all of which are beyond the scope of the express service authority pursuant to which Rexco conducts its operations. Moreover, complainants allege that Rexco violates its published tariffs and governing publications by regularly performing stop-in-transit service and by its failure to issue uniform express receipts or uniform express bills of lading. Complainants and petitioners also set forth data to demonstrate that Rexco's published rates are equivalent to those of general freight carriers instead of being set at premium levels (which express service authority demands). Complainants also attribute other unlawful activities to the Rexco operations. They contend that Rexco's procedures for employing the services and equipment of owner-operators on a trip-lease basis are violative of this Commission's rules governing such transactions in Lease and Interchange of Vehicles, 49 CFR 1057.1 et seq., in that the duration of the Rexco trip-lease agreements are not of sufficient (30-day minimum) duration and because of a lack of proper inspection of the motor vehicle equipment utilized pursuant to those agreements. Moreover, based on data contained in shipment manifests obtained in discovery herein, complainants contend the services performed by Rexco drivers, are, in numerous instances, violative of hours-of-service rules of the Department of Transportation.

In conclusion, complainants argue that "all" outstanding temporary authorities issued to defendant, especially those in No. MC-66562 (Sub-No. 2308 TA), the so-called "hub" temporary authority, should be revoked and all corresponding permanent authority applications, especially that in No. MC-66562 (Sub-No. 2345)(Part No. 181), the so-called "hub" permanent authority application, should be dismissed because of the failure of defendants to render a continuous and adequate service with respect to the former, and to maintain active prosecution of the latter.

Generally speaking, the Bureau of Enforcement contends that the transportation service being performed by the Rexco Division is not express service and therefore Rexco is operating beyond the scope of the REA authority which is limited to the performance of transportation in express service. More specifically, the Bureau argues that in many instances shipments handled by Rexco (1) are not transported pursuant to established schedules, (2) do not move over specified or, in some instances, authorized routes, and (3) involve unnecessary interruptions, all of which is inconsistent with this Commission's description of express service. Moreover, the Bureau argues that Rexco's published tariffs exclude the carriage of smaller weight shipments and certain commodities requiring special care in handling. Furthermore, it contends that Rexco's emphasis on the solicitation of traffic which is not susceptible to transportation in van-type trailer equipment, effectively restricts the access of the shipping public to Rexco's services to an extent contrary to Rexco's duty to render express service. In conclusion, the Bureau contends that the failure of defendants to provide any but a small portion of the service authorized in REA's operating authority, for this reason alone, results in operations which cannot be characterized as express service.

As a general proposition, defendant contends that by seeking the relief requested in this proceeding, complainants and petitioners have abused the processes of this Commission in a concerted effort to eliminate the competition of the defendant and the potential competition of the nationwide express service which intervenor Alltrans plans to

provide. As another general proposition, defendants maintain that the Rexco operations are the only REA operations which are the subject of this proceeding; and that the Rexco operations must be viewed as a small part of REA service and, further, as an attempt on the part of REA's trustee in bankruptcy to protect and preserve the operating rights of the bankrupt REA Express, Inc. Defendant argues that the complainants have failed to meet their respective burdens of proving that the Rexco operations have deviated and are continuing to deviate from the express service defendant is obligated to provide. Moreover, defendant contends that Rexco's truckload service and its policy of transporting any and all commodities regardless of whether they move in ordinary van-trailer equipment are proper and that as an express carrier it is exempt from the Lease and Interchange of Vehicle rules under 49 CFR section 1057.3(b). Furthermore, defendants argue that inasmuch as compliance was made with each Commission order in the hub permanent authority application proceeding and, inasmuch as the Commission has never set a date for oral hearing in that proceeding, the hub permanent authority application cannot be dismissed for want of prosecution and the corresponding hub temporary authority cannot be cancelled. Additionally, defendants argue that because intervenor in opposition Alltrans has contracted with REA's trustee in bankruptcy, subject to Commission approval, to operate the outstanding authorities of REA and to be substituted as applicant in REA's permanent authority applications, there can be no doubt of the bona fide intention to prosecute the permanent authority hub application. Defendants contend that should the Commission dismiss the permanent authority hub application and cancel the hub temporary authority notwithstanding the foregoing contentions, this action will deprive the shipping public of the resumption of a nationwide express service of the type historically provided by REA.

Alltrans Express U.S.A., Inc., intervenor in opposition to the involved complaints and petitions filed, on September 27, 1976, applications docketed in No. MC-F-13003 and No. MC-99388 (Sub-No. 11), relating to its planned purchase of the defendant's operating rights. It contends that cancellation of REA's hub temporary authority is wholly dependent upon the dismissal of the corresponding permanent authority hub application because of this Commission's order extending the hub temporary authority for a period pending the outcome of the corresponding permanent authority application. Furthermore, Alltrans argues that the record herein demonstrates no failure on the part of REA to prosecute said permanent authority application but rather, as Alltrans alleges, a failure on the part of this Commission to set a date for oral hearing in the permanent authority hub application proceeding which has resulted in the delay in prosecution of that application. Alltrans further contends that complainants have not demonstrated that the present operations by Rexco are violative of REA's express service authority in that the evidence adduced by complainants and petitioners in this regard consists of testimony of witnesses who were formerly employed by REA several years ago and who therefore are not competent to testify as to current Rexco operations. Moreover, as to Rexco's allegedly unlawful rate levels and tariff restrictions, Alltrans argues that there is no requirement for the assessment of premium rates or prohibition against the trasnportation of truckload shipments by motor carriers operating pursuant to express service authority. Furthermore, as to instances of delay or unreasonable interruptions in the services of Rexco alleged by the Bureau of Enforcement, Alltrans maintains that such instances were isolated and infrequent relative to Rexco's overall operations. In short, Alltrans contends that the record herein does not demonstrate that Rexco has been rendering a service in any significant way inconsistent with the

express service authority under which REA formerly operated. Alltrans submits that it has made an agreement with defendant REA's Trustee in Bankruptcy which is subject to the approval of this Commission in a finance proceeding in No. MC-F-13003 to operate temporarily all authorities of REA under section 210(a)(b) of the Interstate Commerce Act, to prosecute all pending REA motor carrier authority applications, and to purchase all existing REA operating authority. Alltrans states that it will provide a "full-spectrum" service to the extent of the REA authorities. Consequently, it argues that substantially all of the issues in the instant proceeding will be moot should it prevail in the above-noted finance proceeding.

REPLY BRIEFS?

Complainants reply that their actions herein are directed at the alleged unlawful operations of REA through its Rexco Division and do not constitute a concerted, anticompetitive assault on the bona fide express operations conducted by REA. In this regard, complainants state that Rexco's operations are indistinguishable from, and thus directly competitive with, the services of general freight carriers which, for the most part, complainants represent. Consequently, complainants contend that their rights of action in this proceeding are valid and moreover that they are entitled to relief sought by them herein from the alleged unlawful operations of Rexco which are damaging their operations and the operations of those which they represent. Complainants contend further that contrary to any inaction on the part of the Commission as alleged by defendants and intervenor in opposition, it is REA's express repudiation of the operational feasibility of the "hub" concept in various Commission proceedings subsequent to the filing of the hub permanent and temporary authority applications which has created the undue delay in prosecution of the hub application for permanent authority. Further, complainants argue that any such delay atrributable to this Commission, under the circumstances involved, does not to any degree relieve REA of its duty under Rule 247(f) of the Commission's Special Rules of Practice [49 CFR 1100.247(f)] for timely prosecution of the hub application. Thus, complainant contends that the hub application for permanent authority must be dismissed and the corresponding hub temporary authority must be cancelled. Finally, complainants contend that a potential substitution of Alltrans as applicant in the hub application for permanent authority and as operator under the corresponding hub temporary authority should not be allowed to prevent dismissal of the former or cancellation or revocation of the latter, owing to the fact that REA has admitted to the unworkable nature of the hub concept relative to its historic nationwide express service and because the stated intentions of Alltrans to institute a "full-spectrum" express service pursuant to the hub application cannot neutralize these admissions as to the lack of operational feasibility of the hub application service proposal.

The Bureau replies that, contrary to assertions by the defendant, the range of commodities transported in the service performed by Rexco is inconsistent with express service in that Rexco provides transportation for any commodity which may "conceivably" be carried in van-type trailer equipment rather than those commodities which could "safely" be carried in such equipment. Otherwise, it reasserts the contentions made in its initial post-hearing brief.

Defendant replies that Rexco's operations reflect an attempt by REA to offer service under its operating authorities to the extent possible, albeit to a small extent relative to the past nationwide

REA operations, within the context of REA's bankruptcy. They contend further that because Alltrans is seeking to revitalize REA's nationwide general express services, for this Commission to cancel the operating rights of REA and to dismiss the REA applications for permanent authority as complainants request on the basis of the operations of REA's Rexco Division, would result in a penalty far outstripping the wrongs, if there be any, committed by REA through its Rexco Division and would work to the severe detriment of the shipping public by depriving it of the nationwide express service to be provided by Alltrans.

Alltrans replies that complainants request for dismissal of all temporary authorities issued to REA, based on the alleged willful and wanton violations by defendants of their express service obligations is beyond the legitimate scope of this proceeding. It asserts that such action on the part of this Commission, based on the record in this proceeding, would constitute a breach of due process. Nevertheless, based on what it purports to be the abstract nature of the term "express service" and the overall record herein, Alltrans contends that complainants have not maintained their burden of proving the existence, much less the willfulness of such violations on the part of defendants.

PRELIMINARY MATTERS

On brief, complainants renew their objection to the Administrative Law Judge's ruling that a number of complainant carriers would not be allowed to testify because their testimony would be cumulative and because prepared statements giving the exact nature of their testimony had been submitted prior to the start of the hearing. Rule 76 of the Commission's General Rules of Practice, 49 CFR 1100.76 notes the duty of the hearing officer to limit the number of witnesses whose testimony may be merely cumulative. The ruling that the noted material would be cumulative was made after testimony and cross-examination of several complainant carriers had been allowed and, under these circumstances, the ruling was a proper exercise of the Administrative Law Judge's function. See NLRB v. Donnelly Garment Co., 330 U.S. 219, (1947).

Complainants also object to the receipt, as "facts", of several exhibits presented by the defendant. These exhibits, identified by defendant as "Admissions and/or Stipulations of Fact" are quotations of findings regarding REA that were made in prior, identified decisions of this Commission. They are not excerpts taken only from the records of those proceedings and they do not relate to matters (such as proof of public need), which possibly could be refuted by cross-examination. The quoted findings pertain to the historical functions of REA as related by this Commission and we conclude that this properly may be received and considered in this proceeding. Compare Coastal Tank Lines, Inc., Ext. - W.Va., 108 M.C.C. 190, at 194, and cases cited therein. In a similar vein, we also will take notice of our findings in other cases cited below as well as statements of the Commission made in its annual reports to Congress. See Santa Fe Trail Transp. Co. Ext. - Colo. & Kans. Points, 111 M.C.C. 224, at 227. Accordingly, we consider that the so-called "Admissions" were properly received.

Although a number of other objections were made during the course of the hearing by several of the parties, these objections have not been pressed in brief and will be considered as waived. See Rule 87 of our General Rules of Practice.

Intervenor Alltrans has filed a motion to strike complainants' brief or, alternatively, certain portions of that brief. Complainants have filed a reply. The intervenor's motion will be, and it is hereby denied. Clearly, complainants' overall brief is in conformance with our General Rules of Practice. Complainants' comments pertaining to a request that "all" of REA's Temporary Authority be revoked and their comments relative to leasing regulations and REA's fitness may be considered to be material, especially to the Commission's awareness of factors related to the embraced petition proceedings and our duty to know the status of carriers we are required to regulate. The intervenor also asks that testimony of record relative to safety be stricken. The latter request relates to prior objections made at the hearing and not renewed by intervenor on its brief and, as noted above, such request must be considered as having been waived.

HISTORY AND BACKGROUND

In order properly to understand and evaluate the matters involved herein, it is necessary to be aware of the nature of REA's authority, the more recent history of its pre-bankrupt operation, and its post-bankruptcy activities.

Its earlier history has been concisely summarized in our report in REA Express, Inc., Application For ETA, 117 M.C.C. 80 (1971) at pages 81 through 86, a decision which denied a preliminary attempt by REA to restructure further its operations into an irregular route express service. This report also contains a concise description of the so-called "Hub System" which is the subject of the embraced petition proceedings herein, the pending permanent application filed in 1968, and the temporary authority (granted in June of 1968), to operate under the "Hub System". As we stated in that report at pages 84 and 86:

> The "Hub" system sought by REA essentially consists of 24 major points for the dispatch and receipt of small shipment traffic which, according to REA, generally follow the production areas outlined by the Bureau of the Census. Each "Hub" is connected with each of the others by a motor or rail line-haul route, or a combination of both. Each of the "Hubs" assertedly would serve an area containing satellite points to be served in all-motor operations. To implement this system, REA filed the largest single application in the history of this Commission, which application outlined each route and segment proposed to be utilized (without any rail-haul restrictions) in the performance of the "Hub" service.
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> ***
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> Having operated in the Hub configuration for approximately 3 years, REA's new management has recently proposed another complete restructuring of the carrier's operations. To this end, it initially sought temporary authority, based upon the same type of allegations used to support the "Hub" system, to perform nationwide irregular-route service in the transportation of general commodities, moving in express service. That application was denied by order of this Commission served August 9, 1971, for the reasons that

(1) REA had failed to demonstrate an immediate and urgent need for the institution of the proposed service (2) "irregular route" service would be inconsistent with express service, (3) REA had failed to establish that irregular-route service would be either operationally or economically feasible, and (4) REA had failed to establish that the requested authority would solve any of the carrier's asserted operational problems.

Clearly, this Commission has been sympathetic to the various requests of REA's management concerning its operational and rate structuring, in the belief that the carrier's management had presented the most effective, and perhaps the only pattern of service which would keep REA viable. Despite permitting REA such wide latitude, REA is still in perilous financial straits, and, by its own admission, is conducting an uneconomical, loss-producing operation.

We went on to state at pages 88 and 89 that:

. . . The basic indicia of express service have been set forth in previous Commission reports. 3/ One index of express service is that the carrier must perform actual operations between all authorized points upon firmly established schedules allowing minimum practicable highway transit time and providing fixed delivery times which are available to actual and potential shippers at authorized origins which in practice are not changed, except after substantial notice to the general public. In essence, this means that express service, whatever else it may be, must be performed as an expedited, regular-route service. Such service is operationally inconsistent with irregular-route service which, in the usual concept, envisions a "call-on-demand," unscheduled operation. This same issue arose in the Nashua case and, beginning at page 322, it was discussed at some length. Thus, REA has been well advised that its basic proposal contains inconsistent terms and yet we still have not been presented with a rationalization for the inconsistency or any reason for this Commission to modify its previous standard of express service.

If REA is to forego completely its regular-route operations, it well may be that it will evolve into no more than an ordinary motor common carrier of small shipments, and cease to exist as an express company. Should this be the case, REA, as a motor common carrier, could not avail itself of express company terminal areas, but would be limited to those permitted carriers of its new status. The effect of this upon REA's operations cannot be determined upon the record before us.

3/ Transportation Activities of Arrowhead Freight Lines, 63 M.C.C. 573, 581 (1955).

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Several portions of prior decisions, cited in the ETA case, are of special significance. In Railway Express Agency, Inc., Extension - Nashua, N. H., 91 M.C.C. 311, 324 (1962), we stated:

> . . . this Commission has always intended the term "express service" to mean generally the expedited handling of small-parcel traffic which common carriers of ordinary freight do not desire usually or are not able to perform. It is a service superior to that rendered as a rule by common carriers of general freight, and thus requires the payment of premium charges.
>
> From this view it follows that "express service" is not susceptible of precise definition because it is, by its very nature, a service whose attributes of expediency, premium rates, and special handling of freight must be judged in comparison with the services and rates provided and assessed usually by common carriers of ordinary freight.

And, in the earlier report in Transportation Activities of Arrowhead Freight Lines, 63 M.C.C. 573, at 581 (1955), the Commission discussed the basic criteria of a bona fide express service as follows:

> Summary.--Succinctly stated the rendition of a bona-fide express service by property carriers with authority to transport general commodities requires such carriers (1) to provide a bona fide holding out together with the ability to transport any commodity which may be safely transported in ordinary van-type equipment, including those requiring a maximum degree of care or security or both, (2) to provide such care or security or both as the inherent characteristics of the commodities making up the shipment which are accepted may require, (3) to provide equally expeditious transportation and careful handling for all accepted shipments, regardless of their volume, special demands, or value, from the point of pickup to the point of delivery, (4) to perform actual operations between all authorized points upon firmly established schedules allowing minimum practicable highway transit time and providing fixed delivery times which are available to actual and potential shippers at authorized origins and which in practice are not changed except after substantial notice to the general public, and (5) to use relatively simple billing, rate structures, and rate publications whereby the rates and charges for the services offered and performed may easily be determined with a minimum of delay.

Since the filing of the "Hub System" application in 1968, and the attendant approval of temporary authority, the Commission con-

sistently has been aware of and concerned with the status and operations of REA.

We believe that a recognition of such awareness should be reflected in this decision and, in order to do so, we believe it appropriate to take official notice of statements of the Commission made in our 86th (1972) through 89th (1975) Annual Report of the Interstate Commerce Commission, and to quote the following excerpts from these reports:

86th Report (1972) at pages 53 and 54:

> The relative importance of REA Express, Inc. (REA), as a major common carrier of intercity small shipments has declined continually since World War II. For example, in 1946 REA handled 235 million surface shipments, but by 1971 its traffic had declined 94 percent. As a result of this precipitous descent, REA's surface shipments account for less than 1 percent of the tonnage of estimated total regulated intercity small shipment traffic. Service contractions and continued rate increases appear to be the major contributors to this steady decline in business.
>
> Air express traffic has become an increasingly significant part of REA's service, accounting for about one-third of its total business. Even so, its air express tonnage is less than in 1965.
>
> Notwithstanding some improvement in the general economy in fiscal 1972, indications are that REA's general decline has not been arrested. Barring a dramatic upturn in business, REA's outlook for the immediate future is rather bleak.
>
> Although REA's loss in traffic is apparently being absorbed by major regulated competitors (motor carriers, bus express, United Parcel Service, small package carriers, and to some extent, by private shipper associations) total elimination of REA's service probably would cause inconvenience to shippers in the distribution of such items as perishables, live animals and birds, and other special items.
>
> This Commission is extremely concerned with the future prospects of REA Express, Inc., the Nation's largest express carrier. In No. MC-66562, REA Express, Inc., Application for Emergency Temporary Authority, 117 M.C.C. 80, however, we were unable to approve REA's

six-volume application for 30 days' emergency irregular-route temporary authority, because REA failed to set forth (1) any reasonable manner in which it could or would perform virtually nationwide irregular-route service, (2) the manner in which "express" service could be performed on a nonscheduled basis or over anything but regular routes, and (3) the nature of the purported "new financing" which it expected to become available as a result of such a grant of temporary authority.

87th Report (1973) at page 46:

Once one of the nation's premier intercity common carriers of parcel-size shipments, REA Express, Inc. (REA) has fallen upon difficult times as the volume of freight it has carried -- especially over surface routes -- has continued to decline. In 1965, REA handled 1.8 million tons of surface shipments. By 1972, its volume had declined over 68 percent. Managerial disruptions, changing national distribution patterns, service contractions, labor disputes, increased competition, and severe financial difficulties appear to be the principal contributors to the decline in REA's business.

Even air express tonnage, although it increased by approximately 5.4 percent in calendar 1972 over 1971, is still less than that recorded in 1965. While air express tonnage rose, the number of air express shipments declined by 4.3 percent during the 1971-72 period.

As noted in our 86th Annual Report, the long term outlook for REA is not auspicious.

88th Report (1974) at pages 54 and 55:

In regard to surface transportation authority, REA retains its temporary authority, issued in 1968 by this Commission pursuant to section 210a(a) of the Interstate Commerce Act, to operate its "Hub System." The system essentially consists of 24 major points for dispatch and receipt of small shipment traffic. Each hub is connected with the others by a motor or rail route, or combination of both. Each hub assertedly is designed for an area containing satellite points to be served in all-motor operations. The concept proved to be inefficient, necessitating considerable exceptions to the basic operating plans.

Although the system today bears little resemblance to the original concept, the company's operations are based almost entirely upon the temporary authority in the hub application.

Surface express traffic has continued to decline but at a more moderate rate than that experienced by the company in the 1960's. REA surface traffic dropped sharply from 57.7 million shipments in calendar 1965 to 19.3 million in calendar 1970. Correspondingly during the same period, revenues declined from $350 to 267.2 million. However, surface traffic has stabilized somewhat during the past few years. Surface traffic volume in calendar 1971 amounted to 14.5 million shipments, 10.8 million in calendar 1972, and 10.4 million in 1973. Revenues dropped from $172.7 million in calendar 1971 to $148.6 million in calendar 1972 but recovered $161.2 million in 1973. Preliminary estimates indicate that this trend will hold for fiscal 1974.

Preliminary traffic and revenue estimates indicate REA's financial position has improved slightly for fiscal 1974, primarily attributable to a 10-percent rate increase on surface transportation effective March 14, 1974. Whether REA has the capability to continue as a viable transportation entity in light of the CAB order remains to be seen.

89th Report (1975) at pages 48 and 49:

REA Express, Inc. (REA) continued to experience operating and financial difficulties, forcing the company on Feb. 18, 1975, to file for reorganization under Chapter XI of the Bankruptcy Act, Chapter XI allows REA to continue operations while developing workable plans to improve its financial posture thus enabling it to pay off its creditors, principally the airlines, railroads, and banks.

While all debts or claims incurred prior to February 18, 1975, are temporarily frozen, the Commission's insurance requirements protect the shipping public for loss and damage claims. All such claimants will receive payment in full, up to our $2,500 per claim minimum requirements, by the insurance company which made our statutory security filing. Arrangements have been completed for all cargo claimants to be advised of this protection, furnished the name of the insurance company, and how to file their claims.

Such loss and damage claims are being processed and paid with the total payment expected to be approximately $3,000,000. Without this protection, cargo claimants would be required to award (sic)[await] the ultimate resolution of the reorganization proceeding and whatever percentage of payment is decreed.

The pressure of the December 1974 Civil Aeronautics Board ruling which threatened the existence of REA's air express operation, accounting for 62 percent of the company's revenues in 1974, was lessened somewhat by a Federal court ruling which stayed the effectiveness of the CAB order and subsequently remanded the decision to the CAB for further action.

Nevertheless, the CAB views on the need for the type of air express services provided by REA, which led to the Board's decision to terminate domestic air express, still continues to be of prime concern to the company. In April 1974, the Board disapproved an air express agreement negotiated between REA and 22 airlines. Although subject to review by a Federal appeals court, such CAB actions will no doubt be a major determinant in the company's reorganization plans and operational programs.

The CAB has ordered the scheduled airlines to develop operational programs to provide priority air service to replace their agreement with REA.

A statistical profile of REA's traffic shows a marked decrease in the company's air express traffic and revenues. The air volume decreased from 98 thousand tons in 1973 to 86.2 thousand tons in 1974; the number of shipments declined from 6.54 million in 1973 to 4.81 million in 1974; and revenues dropped from $107.4 to $103.2 million for the same period.

Air express volume was down considerably in the first quarter 1974, which probably reflects the uncertainty on the part of the shipping public as to the ability of the company to retain its priority status with the airlines in domestic air express operations.

While its surface traffic volume declined from 713 thousand tons in 1973 to 676.6 thousand tons in 1974, and the number of shipments dropped from 9.99 million to 8.96 million for the period, revenues from its surface traffic rose from $154.5 million in 1973 to $165.8 million in 1974.

Essentially, the company's financial problem is a shortage of cash, although it did manage an operating profit of about $3 million in 1974, compared to a deficit of approximately $8.5 million

in 1973. Its present critical cash position has been attributed by company officials to the general state of the economy, the inability to obtain bank credit and Federal government aid, and the recession in the auto and textile industries -- two of REA's biggest customers.

The Commission's principal action which may affect REA was taken in a report and order served December 20, 1974, United Parcel Service, Inc., Extension -- 48 States, 120 M.C.C. 747. By this order, the Commission's Division 1 granted an extension of the Company's common carrier authority to bring UPS service to all of the 48 contiguous States.

In an effort to survive, REA has realigned its rate structure to be more competitive with forwarder service. REA's planned marketing strategy has been to concentrate on expanding its air express operations, initiating a reorganization plan to tighten control over its trucking operation, and consolidating its surface operations.

During the later years when REA was seeking to restructure its operations for the sake of survival, the Commission, in Chemicals In Aggregate Shipments - Midland, Mich., To East, 335 I.C.C. 20, (1969), approved REA's reduced truckload commodity rates on chemicals where the service otherwise fully satisfied the criteria of Arrowhead, supra. REA also is shown to have participated in certain truckload movements of cosmetics between Chicago, Ill., and Atlanta, Ga., and of bakery items from Pittsburgh to eastern locations. Certain other truckload rates were published by REA, however, it appears that none of these were based upon a mileage scale with general applicability. It also is noted that in another temporary authority application in Sub-No. 2337TA*, a pleading by REA dated June 11, 1971, specifically advised the Commission as follows:

> /F/ or REA to pursue to conclusion the permanent application in the Hub case would do the Commission, the public and REA a considerable disservice. For experience demonstrates that the Hub authority precludes REA from providing to the public a modern, efficient and economical express service. The present and future of

*In Docket No. 66562 (Sub-No. 2337 TA) dated March 1, 1971, REA applied for authority "to operate motor vehicles transporting commodities generally moving in express service between all points in the United States over non-radial irregular routes."

shippers and REA depends on replacing the Hub and other bits and pieces of motor operating authority it holds with the authority sought herein. Rather than imposing a burden on the Commission, REA's present application will avoid the necessity of a hearing on the Hub application -- which events have shown cannot do the job -- as well as the numerous pending atomized bits and pieces of regular route authority. For REA will dismiss the Hub proceeding and all other pending applications for motor operating authority upon final approval of the grant of the authority sought.

The Rexco Division of REA[4/] was established in the Spring of 1975, and commenced operations in August of 1975. REA which had been operating since February, 1975, as a Debtor-in-Possession under Chapter XI of the Bankruptcy Act, was by Order of the Court entered November 6, 1975, adjudicated a bankrupt and ordered liquidated. Thereafter, on November 7, 1975, REA filed "Embargo Notice No. 1" placing an embargo against all traffic tendered to REA Express, Inc. after 12:01, Friday, November 7, 1975. By virtue of a tariff issued June 10, 1975, effective June 15, 1975, I.C.C. 153, Commodity Tariff 85, the Rexco Division of REA remained in operation as a result of an amendment to Embargo Notice No. 1 issued November 10, 1975. All other REA operations, except those of the Rexco Division, ceased operation in November, 1975, and since that time all assets have been liquidated except for REA's operating authority. By agreement dated July 27, 1976, and approved by the Bankruptcy Court for the Southern District of New York, by Order dated July 27, 1976, Intervenor contracted with the Trustee, subject to approval of this Commission, to purchase and operate the certificates and temporary authorities of REA.

At the hearing, several former and one current Rexco agents described Rexco's method of operation. Although the general manager of the Rexco Division was present throughout much of the hearing, he did not testify. Also, the Trustee in Bankruptcy was not called to offer any testimony or explanation regarding the Rexco operation or his position regarding other matters.

Rexco's principal employee is its general manager. He operates from the Philadlephia area with a small staff that is principally engaged in billing shipments and paying agents and owner-operators. His principal functions have been in solicitation of traffic and in arranging for agents to solicit traffic and to obtain owner-operators to perform actual pickup, transportation, and delivery. No equipment is owned and none is operated under long term lease. No drivers, mechanics, safety men, tariff experts or supervisors are employed. The agents are located at numerous places across the country.

4/ REXCO, Inc., named in the lead complaint, was determined to be a separate entity not involved in the matters under consideration herein and by stipulation, it was agreed that it should be removed as a party defendant.

The agents were generally instructed that they would solicit and handle traffic originating or terminating basically anywhere east of a line drawn generally north-south through the Rocky Mountain Region of the country in the vicinity of Denver and Albuquerque, plus certain locations west thereof. The agents were paid 7 percent of the revenues. Seventy-five percent of the revenues went to the supplier of the equipment and the driver. No other significant instructions were given regarding REA's actual authority except that Philadelphia could be called if there were problems. Agents were told not to solicit less than truckload traffic and the traffic actually handled was basically truckload or, at least, utilized the entire capacity of the vehicle.

The Rexco tariff basically reflects a scale of rates with at least a minimum 16,000 pound weight and the charge in most instances was within a few dollars of what the charge would be for a 40,000 pound shipment. The tariff specifically embargoed a wide range of commodities including live animals, perishable products, bullion, coin and other items of unusual value formerly handled by REA. The cost of transportation to a shipper (especially on moves of over 300 miles, which the agents were to emphasize), would usually be significantly less under REA's Rexco tariff than comparable moves by irregular route and regular route motor common carriers such as complainants. Agents used this rate difference as a primary solicitation tool.

Since the institution of the Rexco operations, several of the complainant motor common carriers have experienced specific diversion of truckload traffic to Rexco. These shipments have been of truckload amounts and such commodities as auto parts, iron and steel articles, building materials, aluminum, chemicals, and paper. A comparison of the Rexco rates and those of one of the complainants shows that on a 40,000 pound shipment of auto parts from Detroit, Mich., to Chicago, Ill., the shipper would pay complainant $412 and Rexco $220. An owner-operator's share would approximate $1.16 a mile in the first instance and $.62 a mile under a trip lease with Rexco. A detailed examination of Rexco's records by the Bureau of Operations of this Commission showed among other things, that during the period March 1 through 15, 1976, Rexco transported 674 truckload shipments between various points in the United States. Rexco's records reflect that between August, 1975, and June, 1976, it handled approximately 6,000 truckload shipments.

Drivers and equipment generally were obtained at nearby truck stops and trip leases usually were arranged so that an owner-operator could avoid a possible empty back haul, although on some occasions round-trip, back-to-back trip leases were arranged. Some agents had difficulty meeting requests for service because some drivers did not want to trip lease to REXCO as they felt that their overall payment was low or they had had difficulty securing timely payment from Rexco in the past.

The service performed for shippers was direct from consignor to consignee (on rare occasions stop-off privileges were utilized). Ordinary van equipment was often used, however, flatbed units were frequently used for transporting a significant proportion of Rexco's traffic (especially iron and steel articles and heavy machinery). Because of lack of adequate equipment features such as tie downs on ordinary vans, it appears that items such as steel coils and heavy machinery could not have been transported safely in ordinary van equipment.

Rexco has no central dispatch system and once a driver left the origin point he basically was out of Rexco's control. Generally he would call Rexco in Philadelphia only if he wanted to in case of trouble. Inspections of vehicles generally was made by the agents or their associates. Rexco's home office control was exercised only by insistence on completed paperwork being turned in before payment would be made. No check was made as to the accuracy of some paperwork item such as drivers' logs and inspection forms. On occasion, Rexco's records show that proper inspection of vehicles was not made and drivers violated the hours of service regulations of the Department of Transportation.

Except for checking with Philadelphia on accepting shipments to move west of Denver, no attempt was made by agents to find out if the origin and destination points could be served or what routing instructions should be given. Basically, instructions on shipping documents were generalized as "Rexco Direct" or other similar wording. Drivers were not instructed to travel specific routes or to go through specific points and it appears they generally went over the nearest direct highways in the Interstate system or over routes of their own choosing. These routes sometimes went to the driver's home town where the drivers went off duty for hours or days even though delivery could safely have been made within a much more expeditious time frame. A number of Rexco movements crossed Pennsylvania, apparently on Interstate Highway 80, a route not authorized in REA's authority. Other examples of traversal of routes not authorized to REA were shown to have occurred in Texas and Oregon. Also, points were served that are not listed in REA's terminal area publication or Waybill Guide (upon which its tariffs depend), including Fenwick, W. Va., Stephens City, Va., Elverson and Trumbauersville, Pa., Huguenot, N. Y., New London, Tex., and Huntington, Utah.

Except for a few instances where back-to-back trip leases reflected several movements on a regular basis, shipments were handled when a request for service was made and when an owner-operator became available. A delivery commitment was not made.

Rexco has not attempted to comply with the Commission's leasing regulations based upon its contention that section 1057.3 of the applicable regulations (49 CFR 1057.3(b)) provides they shall not apply "to equipment utilized wholly or in part in the transportation of railway express traffic, . . ."

It also appears that those in charge of the Rexco operation have little knowledge of REA's underlying tariff and related publications other than the basic Commodity Tariff 85 which became effective June 15, 1975 and Rexco has not attempted to conform with various provisions relating to requirements that it not provide free pickup and delivery beyond certain limits, that no partial unloading is permitted where charges are collect, and that it issue a Uniform Express Receipt or Uniform Express Bill of Lading.

DISCUSSION AND CONCLUSIONS

For approximately a year now, there has been no traditional small package express service by REA Express, Inc. REA is gone except for (1) operations conducted by the so-called Rexco Division under REA's authority and (2) REA's one unliquidated asset, its certificated operating authority. A decision on the issues described in these proceedings cannot require a trying of any issues

that relate to the apparent proposal of Alltrans Express U.S.A., Inc., to attempt to provide a "full spectrum, nationwide express service" based upon the operating rights that it plans to purchase. Accordingly, our discussion and conclusions herein will be confined to the direct issues covered below, namely: (1) are the operations conducted by REA's Rexco Division a valid exercise of REA's authority which is basically limited to movements in "express service"? (2) should the unprosecuted application of a bankrupt and liquidated carrier, on file for 8 years, be dismissed? and (3) should the temporary authority held by a bankrupt and liquidated carrier be revoked?

I

Turning first to the complaint proceedings, we conclude that the Rexco Division operations cannot be found to be consistent with the basic limitation applicable to most of REA's authority that such movements be "in express service."

Although we have said that "express service" is not susceptible of precise definition, we repeatedly have set forth guidelines that have established the basic indicia of that term. Here, we need not consider whether an operating express company, holding authority limited by these terms, could never stray outside the general definition set forth in the ETA, Nashua, and Arrowhead cases, supra. We do not deny that there could be situations (such as the handling of consolidated truckloads), where a service would not meet one of the general criteria of express service but would at least satisfy several of these requirements. Also, we need not consider if an operating express company, whose overall transportation activities predominantly satisfy the definitions of express service, can conduct operations not within the strict concept of express service but nevertheless incidental to express service. Compare the decision in Chemicals in Aggregate Shipments, supra. Here, since at least November of 1975, the Rexco operation has been conducted in such a manner that it completely lacks even a minimal attempt to conform with the well established indicia of express service. The operation conducted by Rexco bears no relationship to REA's traditional small parcel service other than the incidental use of the phrase "a Division of REA Express, Inc.," and the sanction of the Trustee in Bankruptcy to use REA's operating rights in exchange for certain revenues.

In effect, the Trustee has allowed the establishment and perpetuation of an REA franchise system that amounts to nothing more than an unauthorized leasing of operating rights to various commission agents who desire to use the REA name, authority, and tariff. The Rexco Division itself is nothing more than an agent and sales solicitation service with an attendant billing service.

Rexco's general manager does not direct, control, or bear responsibility for REA's operations. As noted, the defendant herein failed to call this general manager as a witness, the one person who would appear to be most knowledgeable about the Rexco activities. Thus, there is nothing on this record to indicate that there is anyone capable of knowledgeable and responsible management of the purported motor carrier operations under REA's authority. To the contrary, the investigation of the complainants and the Bureau and the testimony of past and present Rexco agents, show the following: no one in the management of Rexco is familiar with the overall scope or limitation

of REA's operating authority; no attempt is made to see that service is performed to and from authorized points (with the exception of some points west of Denver); no attempt is made to see that drivers traverse authorized regular routes or to instruct them to use such routes; no responsibility is taken for control of drivers or shipments after pickup; no attempt is made to insure the expeditious movement of any shipment; no attempt, other than completion of paperwork, is made to insure the required inspection of trip-lease vehicles, the proper filling out of drivers' logs, or the attendant proper observation of the Department of Transportation hours of service limitations; no attempt is made to insure that only commodities covered by its tariffs are transported; no attempt is made to transport less-than-truckload or small package shipments; no attempt is made to use only ordinary van equipment; no attempt is made to see that proper express receipts or other tariff requirements are followed; and no attempt is made to be knowledgeable of leasing or other regulations that would tend to be applicable to its method of operation.

The record does show that the Rexco operations are not performed pursuant to any established schedule (a few movements have occurred on a regular basis); the operations are not conducted over regular routes; they do not move through or between terminals; they do not move at premium rates; they do not move in an expeditious manner; they often do not move in ordinary van equipment; they exclude the transportation of small parcels and less-than-truckload volume; they exclude the transportation of unusual type commodities; and they do not handle shipments requiring special care. In short, the record shows that Rexco operates, in effect, simply as a broker of irregular-route transportation of truckload quantities and, under these circumstances, no conclusion can be sustained other than that Rexco's operations are and have been beyond the scope of REA's underlying authority. The assertation by intervenor Alltrans and the defendant to the effect that REA's past operations have been those of a "full-spectrum" carrier amounts to little more than "sloganism" and is, to put it politely, inconsistent with the factual history of REA's operations. Although we recognize the duties of a trustee to preserve the asset of a bankrupt entity, it must be made perfectly clear that that duty does not grant a license to circumvent the regulatory requirements of this Commission. Here, the Trustee has chosen to pursue an extreme approach assertedly to preserve the "authority" asset of the bankrupt and, moreover, has actually attempted to expand upon that authority, without approval from this Commission (and without due process in respect to existing motor carriers), by moving the company into a substantially different area of transportation than that which it holds authority for. In his disregard of the limitations of REA's authority, he may have jeopardized, rather than preserved, that asset. Here, we must conclude that the past Rexco Division operations have been in the nature of willful violations that cannot be considered to be of the type that could be evaluated as "good faith" operations, "under color of right" and thus given affirmative weight in the future purchase proceeding or any related matter.

The Rexco operations have been totally illegal and all of its transportation services in non-express movements through the use of commission agents and trip-leased equipment must end immediately. Accordingly, an appropriate cease and desist order will be entered.

II

The application in the so-called "Hub System" proceeding must be dismissed. It has been on our docket for 8 years and since the pre-hearing conference held on January 12, 1970, no further action has been requested by the applicant despite an initial assertion at prehearing that it would be ready to present its operating evidence in April of 1970. Rule 247(b) of our General Rules of Practice requires that an applicant who does not intend timely to prosecute its application shall promptly request dismissal thereof. This, we believe, places some affirmative duty on an applicant to prosecute or seek dismissal. Applicant has done neither. It apparently did not seek dismissal because to do so would require the termination of its corresponding temporary authority in Sub-No. 2308 TA. It attempted to make a go of the "Hub System" approach between June, 1968, and mid 1971, but, in effect, it repudiated that approach, and specifically expressed its intention to dismiss the Hub proceeding, if it could be granted temporary authority to try another approach (See the ETA decision, supra, and the pleading in the Sub-No. 2337 TA noted above). Authority to try other approaches was denied. REA tried to survive while attempting to operate under the "Hub System", but did not succeed.

Clearly, REA would have failed much sooner had it not been for the forbearance of this Commission (and the motor carrier parties to the application proceeding), in giving REA every possible leeway and not forcing it to go immediately to hearing on matters it was not in a position to prove.

The Commission must not passively burden the administrative process by failing to recognize factors concerning the probability that a bankrupt and liquidated carrier will not and cannot prosecute its outstanding applications. There is no rationale for failing to dismiss pending applications under such circumstances, unless there is some positive showing that can persuade us otherwise. This is especially true where the concept of the application involves unique factors and considerations and where it is shown that the proposed operation is, in all probability, not feasible and there is little probability that the application would or could be successfully prosecuted.

We conclude that no reasons are shown to exist at this point in time to allow the continued pendency of the unprosecuted REA "Hub System" permanent application, that dismissal of this application will not be inconsistent with the public interest, the public convenience and necessity, or the National Transportation Policy and, accordingly, we will order dismissal of that application.

III

The temporary authority currently outstanding in Sub-No. 2308 TA must be revoked inasmuch as the continuation of temporary authority is conditioned upon the pendency of a corresponding permanent authority application (49 CFR 1101), and, we have concluded herein to dismiss that corresponding application.

Moreover, even if the corresponding "Hub" application were not dismissed, ample cause otherwise exists for the prompt revocation of the Sub-No. 2308 TA temporary authority. We may revoke temporary authority at any time under the provisions of Section 210a(a) of the Interstate Commerce Act and 49 CFR 1101.4 which states that:

> "nothing in this part shall be construed as preventing the Commission from terminating at any time, in accordance with law, any temporary authority or approval, or any extension thereof under section 558 of the Administrative Procedure Act (5 U.S.C. 558)".

Accordingly, if the Commission finds good cause, it may revoke an outstanding temporary authority as long as its decision to do so is not arbitrary, capricious, outside of Commission discretion, or otherwise not in accordance with established principles. Here, the parties have had ample opportunity to make their views known to the Commission and, in consideration of these views and the record before us, we conclude that such good cause exists in this proceeding for the following reasons.

First, we observe that the fitness and ability of a carrier to conduct operations under temporary authority always is a matter of special concern. We believe the record herein shows that REA has absolutely no operational capability to perform any express service under the scope of the involved "Hub System" temporary authority. Moreover, the performance, under the apparent approval and direction of the Trustee in bankruptcy of the improper operations discussed above, shows that REA, as it now exists, is not fit to conduct proper and safe operations. Next, we again note that the feasibility of any proper operations under the "Hub System" have been shown to be impractical. Finally, we conclude that the use of the "Hub System" authority by the Rexco Division has caused a significant diversion of traffic (approximately 6,000 shipments up to May, 1976), and revenue from the Nation's regulated motor carrier industry (traffic that has had nothing to do with REA's traditional small parcel express service), and that to continue to allow such diversions would be inconsistent with the Commission's duty to promote and foster sound economic conditions in transportation under the National Transportation Policy.

Under these circumstances, we find no saving reason to perpetuate the "Hub System" temporary authority and we find it necessary and proper at this time to revoke this authority. And, for the reasons noted above, we will undertake a review of all other outstanding temporary authorities granted to REA but not directly before us in these proceedings with a view toward their necessary revocation.

The defendant REA and intervenor Alltrans make it clear that, pursuant to a contract between them, Alltrans would seek to revitalize operations which REA voluntarily shutdown well over a year ago. Certain of these operations have not been performed for a number of years. We take particular note of the fact that the shipping public has been without this service by REA and that other carriers have expanded to fill the void created as REA's service eroded over the

years. It is in that light that we look upon the contention of REA and Alltrans that dismissal of REA's pending applications for permanent authority and cancellation of its corresponding applications for temporary authority would amount to a severe detriment to the shipping public supposedly by depriving it of a nationwide express service to be provided by Alltrans. It was an unfortunate circumstance that an important provider of parcel service has had a strike in a number of eastern States at a time when the transportation system normally is called upon to handle an extraordinary amount of holiday-season shipments. Nevertheless, whatever immediate need arose out of that strike cannot be a major consideration in determining the long-range issues in these proceedings or in the Alltrans' proposal to embark upon a new nationwide general express service. There is available within the law today -- through Section 210a(a) of the Act -- a means by which any immediate and urgent need for transportation service can be satisfied by willing carriers. Further if there is, in fact, a need for a nationwide general express service to handle, by motor carrier, general commodities over regular routes, and such a service can be distinguished from that now being provided by regular-route carriers of general commodities, the law provides a way through Sections 210a(a) and 207 (and certain other provisions) of the Act by which carriers may seek appropriate authority. The present statutory plan provides the means by which such a service can be instituted on an emergency basis if an urgent need can be shown.

IV

Under all these circumstances, it is concluded that the complainants have satisfied their initial burden to establish a prima facie case, that the defendant has been afforded appropriate due process, and that complainants have carried their ultimate burden of persuasion. Compare Natl. M. Fit. Traffic Assn. v. Columbia Shippers, 105 M.C.C. 846 at 850.

Lastly, it is also concluded that no significant factors are shown on this record to indicate that either a grant or a denial of the relief sought herein would have any significant effect upon the quality of the human environment or upon the consumption of energy resources.

FINDINGS

In Nos. MC-C-8862, MC-C-8864, MC-C-8867, and MC-C-8874, we find that defendant REA Express, Inc., bankrupt, through C. Orvis Sowerwine, Trustee in Bankruptcy, of New York, N. Y., is and has been engaged in the performance of motor common carrier service which fall outside the definition of express service and in services otherwise beyond the scope of its specifically limited authorities as detailed above; and that an order should be entered requiring defendant to cease and desist forthwith and thereafter to refrain and abstain from all operations of the character found in this report to be unlawful, unless and until appropriate authority therefor is obtained.

In No. MC-66562 (Sub-No. 2345)(Part No. 181), we find that applicant REA Express, Inc., has failed to prosecute its application in a timely manner; that applicant is not shown to be capable of prosecuting the application; that attempted prosecution of the application would not appear likely to result in a feasible operation

consistent with the public interest and the national transportation policy or required by the public convenience and necessity such that any appropriate authority would be issued as a result of such prosecution; and that an order should be entered dismissing the application.

In No. MC-66562 (Sub-No. 2308 TA), we find that good cause has been shown for the termination of the involved temporary authority, and that an order should be entered revoking said authority.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

COMMISSIONER O'NEAL concurred in the result.

COMMISSIONER CORBER did not participate.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 17th day of November, 1976.

No. MC-C-8862

BRADA MILLER FREIGHT SYSTEM, INC. v. REXCO, INC. AND REA EXPRESS, INC.

No. MC-C-8864

SCHNEIDER TRANSPORT, INC. v. REA EXPRESS, INC.

No. MC-C-8867

AMERICAN TRUCKING ASSOCIATIONS, INC. v. REA EXPRESS, INC.

No. MC-C-8874

ASSOCIATED TRUCK LINES, INC., ET AL. v. REA EXPRESS, INC.

No. MC-66562 (Sub-No. 2345)(Part No. 181)

REA EXPRESS, INC. - PETITION OF AMERICAN TRUCKING ASSOCIATIONS, INC., FOR DISMISSAL OF APPLICATION

No. MC-66562 (Sub-No. 2308 TA)

REA EXPRESS, INC. - PETITION OF AMERICAN TRUCKING ASSOCIATIONS, INC., FOR CANCELLATION OF TEMPORARY AUTHORITY

Investigation of the matters and things involved in these proceedings, having been made and the Commission on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is made a part hereof:

It is ordered, That in proceedings Nos. MC-C-8862, MC-C-8864, MC-C-8867, and MC-C-8874, defendant REA Express, Inc., Bankrupt, C. Orvis Sowerwine, Trustee in Bankruptcy, be, and it is hereby notified and required to cease and desist forthwith, and thereafter to refrain and abstain from all operations of the character found in this report to be unlawful and in violation of the Interstate Commerce Act, unless and until appropriate authority therefor is obtained, and said defendant is further required to comply with the provisions of Rule 99 of the Commission's General Rules of Practice (49 CFR 1100.99).

It is further ordered, That in proceeding No. MC-66562 (Sub-No. 2345)(Part No. 181), the proceeding be, and it is hereby, dismissed.

It is further ordered, That in proceeding No. MC-66562 (Sub-No. 2308 TA), the temporary authority granted by the order of June 3, 1968, as extended, be and it is hereby revoked.

It is further ordered, That all motions filed herein be, and they are hereby, denied.

And it is further ordered, That the statutory effective and compliance date of this order shall be 30 days after the date of service hereof.

By the Commission.

ROBERT L. OSWALD,
Secretary

(SEAL)

C.I. 66

BEFORE THE
INTERSTATE COMMERCE COMMISSION

NO. MC-C-8862, et al.

BRADA MILLER FREIGHT SYSTEM, INC. v. REXCO, INC.
AND REA EXPRESS, INC.

PETITION OF BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS
FOR RECONSIDERATION AND/OR REHEARING OR FURTHER HEARING

The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC) hereby petitions the Commission, pursuant to the provisions of Section 1100.101(b) and (c), for reconsideration of its opinion and order, dated November 17, 1976, served November 19, 1976, in the above-entitled proceedings and/or rehearing or further hearing in those proceedings. This petition is based upon the following grounds:

1. The National Transportation Policy (54 Stat. 899) imposes certain duties upon the Commission in its administration of the Interstate Commerce Act. The existence of such a duty by the Commission to act consistent with the National Transportation Policy has been specifically cited by the Commission at least twice in its opinion and order of November 17, 1976, in the above-entitled proceedings. The Commission's decision errs in its failure to take into account, consider

and weigh one of the most important factors of the National Transportation Policy. That Policy specifically recognizes and refers to the interest of employees in a sound national transport system. This interest of the employees is reflected in numerous other provisions of the Interstate Commerce Act, such as Section 17(11) providing for the representatives of employees of carriers to intervene and be heard in cases arising under the statute and in numerous Interstate Commerce Commission proceedings under the statute. Nowhere does the Commission's decision of November 17, 1976, even mention the interest of the employees of REA Express in the operation involved, much less take that interest into account and consider it with respect to the Commission's order. This omission is substantial and serious because there are approximately 15,000 employees involved (who either actively worked for REA Express in 1975 or who were on furlough with employment rights) whose average age is approximately 55 years, whose working experience has been largely with REA, and whose chances of employment elsewhere are minimal.

The net result is that the employees of REA Express are suffering capital punishment at the hands of the Commission in direct violation of the statutory requirements. The record already before the Commission shows that there are bankruptcy proceedings in progress in the Federal Court in New York City, which do not look toward the liquidation of REA Express, as the Commission's decision keeps saying, but rather look toward the reorganization and continued operation of an express service employing substantial numbers of REA Express employees. In addition to what is already in the record, the BRAC petition for modification of the

Commission's order of November 17, 1976, provides specific citations as to those proceedings. The Commission's order in these proceedings, by revoking all of the authority of REA Express and dismissing its pending applications, destroys the opportunity for successful emergence of the REA Express service from the bankruptcy proceedings. It is not for the Commission to conclude that such efforts will not be successful when it does not furnish any opportunity, but rather destroys that opportunity. Assuming arguendo that Rexco's operations did in some respect violate the Interstate Commerce Act and the regulations, that problem could adequate be taken care of by cease and desist orders. There was no need to destroy the employees' job opportunities by the other actions taken by the Commission in revoking the operating authority of REA Express and dismissing its applications. The reasons given in the Commission's opinion pale in significance when compared to the economic burdens its order and opinion create, contrary to all of the efforts and policies of the Federal government to hold down the rising unemployment rate. The temporary authority is revoked upon the technical ground that the REA application for permanent authority has been dismissed. It is respectfully submitted that the Commission should at least have given a successor or reorganized REA emerging from the bankruptcy proceedings an opportunity to process its applications and to continue the temporary authority. The Commission itself apparently recognizes the inadequacies of this technical ground for its drastic action because its opinion goes on (page 21) to conclude that good cause exists for "the following reasons". It then lists "First" and never gets

beyond the one reason, such reason being a diversion of traffic from the nation's regulated motor carrier industry by the Rexco Division. It is respectfully submitted that such a reason is also not adequate to end for all time the employment rights of the REA employees without any consideration and particularly in view of the fact that the Commission's order requires Rexco to cease and desist forthwith from the activities causing the diversion.

2. It is the view of the Brotherhood of Railway and Airline Clerks that the record already contains sufficient information for the Commission to reconsider its opinion but if it does not, then BRAC alternatively requests that the record be opened for rehearing to place any such needed additional facts in the record on the same grounds as are set forth in its motion for leave to file a petition for leave to intervene and to intervene in the proceedings.

Respectfully submitted,

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December 7, 1976

C.I. 61

BEFORE THE
INTERSTATE COMMERCE COMMISSION

NO. MC-C-8862, et al.

BRADA MILLER FREIGHT SYSTEM, INC. v. REXCO, INC.
AND REA EXPRESS, INC.

PETITION OF BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS
FOR MODIFICATION OF EFFECTIVE DATE OF COMMISSION ORDER

The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC) hereby petitions the Commission, pursuant to the provisions of Section 1100.101(c) of the Rules of Practice and Procedure of the Commission, for a modification, as set forth below, of the effective date of the Commission's order of November 17, 1976, in the above-entitled proceedings.

On November 17, 1976, the Commission issued its report and order in the above-entitled proceedings. The Commission's order directed REA Express, Inc., Bankrupt, C. Orvis Sowerwine, Trustee in Bankruptcy, to cease and desist forthwith from certain operations as described therein. The order further dismissed the proceeding in No. MC-66562 (Sub-No. 2345)(Part No. 181), revoked the temporary authority of REA Express granted by the Commission's order of June 3, 1968, as extended,

in proceeding No. MC-66562 (Sub-No. 2308 TA), denied all motions filed in the proceedings, and provided that the statutory effective and compliance date of the order should be 30 days after the date of service, which was November 19, 1976.

BRAC respectfully requests that the Commission modify the effective date of this order pending the final resolution of (1) proceedings in the United States Di trict Court for the Southern District of New York identified as REA HOLDING CORPORATION, THE EXPRESS COMPANY, INC., REA EXPRESS, INC., f/k/a Railway Express Agency, Inc., REXCO SUPPLY CORPORATION, Bankrupts (Bankruptcy Nos. 75-B-0251, 75-B-0252, 75-B-0253, 75-B-0254), and (2) in the United States Court of Appeals for the Second Circuit identified as REA HOLDING CORPORATION, THE EXPRESS COMPANY, INC., REA EXPRESS, INC., f/k/a Railway Express Agency, Inc., REXCO SUPPLY CORPORATION, Bankrupts, MANNING, et al, Creditors-Appellants v. C. ORVIS SOWERWINE, Trustee in Bankruptcy, Appellee (Docket No. 76-5039). In the alternative, it is requested that the Commission modify the effective date of its order pending decision on petitions for reconsideration and, if such petitions are denied, thereafter pending a final decision in any cases of judicial review of the order filed within 60 days after the denial of such petitions for reconsideration. This petition is based upon the following grounds:

1. BRAC has been the duly designated and authorized representative under the Railway Labor Act for more than 40 years of the great

bulk of the employees of REA Express, Inc. At the time this carrier was declared a bankrupt by the Bankruptcy Court in New York City on or about November 6, 1975, BRAC carried on its membership rolls approximately 15,000 persons who were then either active or furloughed employees of REA Express. During the period of time prior to the filing of the bankruptcy petition on or about February 18, 1975, approximately 12,000 of these members were actively employed by REA Express.

2. The proceedings in bankruptcy, identified above, look toward the continuation of an express operation which will employ as many as possible of these now unemployed individuals or toward a reorganization of REA Express itself so that the carrier may provide an express service employing the individuals involved. The order of the Commission dated November 17, 1976, totally destroys this possibility and, if it becomes effective on December 19, 1976, as provided therein, it will eliminate any hope of these individuals of returning to an employed status in occupations in which most of them have spent their entire adult working lives.

3. The destruction of reemployment possibilities of these persons through an express operation brought about by the bankruptcy proceedings is clearly contrary to the public interest. It will mean that these 15,000 individuals will for the most part be completely unemployed. As of last year, the average age of the

individuals involved was more than 50 years. Their working experience has been as express employees. The possibility that individuals of such age will be reemployed in other occupations in which they do not have experience is nil. The effect, therefore, of the Commission's order, if it becomes effective on December 19, 1976, is to add approximately 15,000 people to the permanent unemployment rolls. Such a result, if it can be avoided, is clearly not in the public interest. One of the most pressing problems now facing the economy of this country and the Federal government is the growing unemployment of American citizens. It would indeed be ironic for one of the major agencies of the Federal government to contribute to this adverse situation at the very time that the government itself is seeking to stem the unemployment tide.

4. This result can and should be avoided without any adverse impact upon the public interest. Assuming arguendo the correctness of the factual findings of the Commission set forth in its opinion of November 17, 1976, as a basis for the order involved, the public interest will not be injured by the modification of the effective date which BRAC seeks by this petition. BRAC understands that the Rexco Division of REA Express ceased all operations not later than November 25, 1976. Therefore, the operations with which the Commission has been concerned have ceased. The only impact, therefore, of the Commission's order becoming effective on December 19, 1976, is the destruction of the employment possibilities and rights of some

15,000 individuals who have violated no law or any regulation of the Commission, but who have simply been unfortunate enough to be working for a carrier involved in bankruptcy proceedings. It will not injure the Commission nor the public interest for the Commission to modify the effective date of its order until the resolution of the bankruptcy proceedings identified above at which time the Commission can take another look at the situation and balance the public interest factors involved.

5. In the alternative, the Commission should at least modify its order pending a decision by the Commission on petitions for reconsideration of such order, including the petition of BRAC filed simultaneously herewith, and thereafter to permit judicial review of said order. The situation and the order are not ordinary. The order amounts to capital punishment and destruction of the lives of 15,000 people. It should at the very least be stayed by the Commission's and pending judicial review thereof, particularly in light of the fact that the Rexco Division has ceased the operations which led to the order in the first place.

It is therefore respectfully requested that the Commission's order be modified as petitioned herein.

Respectfully submitted,

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December 7, 1976

C.I. 128

BEFORE THE
INTERSTATE COMMERCE COMMISSION

NO. MC-C-8862, et al.

BRADA MILLER FREIGHT SYSTEM, INC. v. REXCO, INC.
AND REA EXPRESS, INC.

MOTION OF BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS
FOR LEAVE TO FILE PETITION TO INTERVENE

The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes [hereinafter, "BRAC"] respectfully requests, pursuant to Rule 72(b) of the General Rules of Practice, that it be permitted to file its petition for leave to intervene in the above-captioned proceedings.

BRAC, as shown by the attached petition for leave to intervene, currently represents approximately 15,000 former employees of the bankrupt REA Express, Inc. [hereinafter, "REA"]. As the duly designated representative of those employees, BRAC has a substantial interest in these proceedings, especially since this Commission has ruled that the principal assets of the estate should be revoked. Section 17(11) of the Interstate Commerce Act specifically provides for intervention by representatives of carrier employees and the National Transportation Policy specifically recognizes the interest of employees as one which the Commission must take into account and consider in administering the Interstate Commerce Act.

BRAC was never served with a copy of any of the complaints in

these proceedings, and it only learned of those complaints through statements by other parties. While BRAC was aware of these proceedings shortly before the hearing was in fact conducted, it was decided that BRAC's intervention at that stage of these proceedings, if at all, would not aid the evidentiary presentation since BRAC was unaware of the facts surrounding the specific acts of alleged misconduct. Moreover, not being a party to these proceedings, BRAC was unaware of the full extent of the scope of these proceedings -- i.e., that all of REA's certificates could be revoked, and the reemployment prospects of the employees completely destroyed.

BRAC has acted to intervene as soon as it became aware of the full ramifications of these proceedings. More importantly, BRAC's intervention at this stage of these proceedings, rather than at the hearing, is more appropriate. While BRAC was and is still unable to aid this Commission in determining if, in fact, REA has or has not violated the Interstate Commerce Act and this Commission's Rules and Regulations, BRAC is able to point out to this Commission, inter alia, facts concerning the situation, including the effect that its penalty to REA will have on innocent employees, which the Commission should consider in connection with petitions for rehearing and/or reconsideration.

WHEREFORE, BRAC respectfully submits that it has not sought to intervene earlier for a justifiable reason, will not delay the disposition of these proceedings, and that its intervention at this

stage of these proceedings is in the interests of justice and should be granted.

Respectfully submitted,

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December 7, 1976

C.I. 129

BEFORE THE
INTERSTATE COMMERCE COMMISSION

NO. MC-C-8862, et al.

BRADA MILLER FREIGHT SYSTEM, INC. v. REXCO, INC.
AND REA EXPRESS, INC.

PETITION OF BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS FOR LEAVE TO INTERVENE

The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes [hereinafter, "BRAC"] respectfully requests, pursuant to Rule 72 of the General Rules of Practice, that it be granted leave to intervene as a party in the above-captioned proceedings in support of the preservation of operating rights and applications of defendant REA Express, Inc. In support of this petition, BRAC states as follows:

1. BRAC was and remains the duly designated representative under the Railway Labor Act (45 U.S.C., Section 151 et seq.) of the vast majority of the employees of REA Express, Inc. [hereinafter, "REA"]. Immediately before REA was declared a bankrupt and ordered liquidated on Novemb er 5, 1975, BRAC represented approximately 15,000 active and furloughed REA employees. BRAC still remains the representative of those employees.

2. Employees of REA represented by BRAC are currently priority creditors of the bankrupt estate and, as such, have a substantial interest in the continued viability of REA's certificates of public convenience and necessity, which have been granted by this Commission. Those certificates represent the principal asset of the bankrupt estate. If this Commission revokes those certificates, the possibilities of the employees ever receiving any portion of the wages, pensions and other benefits which are presently owed to them will be greatly diminished, if not entirely eliminated.

3. If REA's certificate authority remains in existence, there is a very real possibility that a reorganized REA, intervenor Alltrans, or some other purchaser of REA or its authority may continue the historic operations of REA and, thus, reemploy many REA-BRAC employees.

4. Many REA-BRAC employees are past 50 years of age and have spent most of their adult lives as employees of REA. If those employees are deprived of their reemployment opportunities with a rejuvenated REA, their job prospects will be substantially diminished.

5. BRAC's intervention in these proceedings will not broaden the issues presently before this Commission. However, BRAC's interest will not adequately be represented by the present parties to these proceedings since BRAC's main concern is the effect of this Commission's decision on the employees of REA and both their creditor and employment rights.

6. If this Commission grants BRAC leave to intervene, BRAC asks that the accompanying documents in the form of a BRAC motion for modification of the effective date of the Commission's order and the BRAC petition for reconsideration be accepted for filing.

WHEREFORE, BRAC respectfully submits that it has a substantial interest in the above-captioned proceedings and that it should be permitted to intervene in order to protect the interests of the approximately 15,000 REA employees which it currently represents.

Respectfully submitted,

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December 7, 1976

BEFORE THE

Interstate Commerce Commission

No. MC-C-8362
BRADA MILLER FREIGHT SYSTEM, INC. v. REXCO, INC. and REA EXPRESS, INC.

No. MC-C-8864
SCHNEIDER TRANSPORT, INC. v. REA EXPRESS, INC.

No. MC-C-8867
AMERICAN TRUCKING ASSOCIATION, INC. v. REA EXPRESS, INC.

No. MC-C-8874
ASSOCIATED TRUCK LINES, INC. ET AL. v. REA EXPRESS, INC.

No. MC-66542 (Sub-No. 2345) (Part No. 181)
REA EXPRESS, INC. — PETITION OF AMERICAN TRUCKING ASSOCIATIONS, INC. FOR CANCELLATION OF TEMPORARY AUTHORITIES

No. MC-66562 (Sub-No. 2308 TA)
REA EXPRESS, INC. — PETITION OF AMERICAN TRUCKING ASSOCIATIONS, INC. FOR CANCELLATION OF TEMPORARY AUTHORITIES

PETITION OF C. ORVIS SOWERWINE, TRUSTEE IN BANKRUPTCY FOR THE DEFENDANT, REA EXPRESS, INC., BANKRUPT, FOR STAY AND RECONSIDERATION, OR ALTERNATIVELY, REOPENING, FURTHER HEARING AND RECONSIDERATION

C. ORVIS SOWERWINE, TRUSTEE IN BANKRUPTCY FOR THE DEFENDANT, REA EXPRESS, INC.

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pp. 8-14
App. A

I.

Past Rexco Operations Have Been Unfairly And Incorrectly Found To Have Been In The Nature Of Willful Violations Not To Be Evaluated As "Good Faith" Operations "Under Color Of Right."

REA Express, Inc., Bankrupt, C. Orvis Sowerwine, Trustee in Bankruptcy, most earnestly and respectfully petitions the Commission to stay, reconsider, reverse and vacate its finding that the past Rexco division operations "have been in the nature of willful violations that cannot be considered to be of the type that could be evaluated as "good faith" operations "under color of right". . ." (p. 19)

(1) The Commission erred in finding that:

> "the Trustee has chosen to pursue an extreme approach assertedly to preserve the 'authority' asset of the bankrupt. . . by moving the company into a substantially different area of transportation than that which it holds authority for. In his disregard of the limitations of REA's authority, he may have jeopardized, rather than preserved that asset. Here, we must conclude that the past Rexco division operations have been in the nature of willful violations that cannot be considered to be of the type that could be evaluated as 'good faith' operations, 'under color of right' and thus given affirmative weight in the future purchase proceeding or any related matter." (p. 19)

First, the record is clear (although the Report and Order of the Commission does not advert to such fact) that the operations conducted by REA's Rexco division had been performed for in excess of three months on hundreds of

properly described as "willful" or which could possibly justify the revocation of authority for the provision of admittedly lawful "express service", and there is a fit, willing and able substitute applicant seeking to continue the operations in express service.

The procedures followed in dismissing REA's permanent authority application and revoking its temporary authority violate due process and the Administrative Procedure Act (1) in failing to provide adequate notice of specific violations alleged, (2) in failing to provide notice that fitness and ability to pursue the permanent application were in issue,[1/] and (3) in failing to provide notice that public convenience and necessity were in issue.[2/] The penalties of dismissal of the application and revocation of the temporary authorities are punitive in nature, unsupported by the facts and the circumstances, arbitrary and capricious, and totally without consideration of the rights of REA, its creditors, its proposed purchaser-Alltrans, and the shipping public which had long been served by REA.

1/ TR 346

2/ TR 346, 648

shipments prior to the appointment of the Trustee in Bankruptcy.[1/]

Second, the Report and Order of the Commission does not relate to or indicate that the operations of the Rexco division were conducted pursuant to court orders[2/] entered by the bankruptcy court permitting the Rexco division to continue operations. The latest order permits the Rexco division to continue operations to January 6, 1977.

Third, and more important, is the fact that the Trustee's actual operations and all of his activities subject to the jurisdiction of the Interstate Commerce Commission were well known to the Commission at all times on and after November 21, 1975. In fact, a meeting was held at the request of the Interstate Commerce Commission at REA's offices in New York City on November 21, 1975. In attendance from the Commission were Arthur J. Cerra, Deputy General Counsel, and Bernard A. Gould, Director, Bureau of

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1/ The Commission's use of the phrase "Here, since at least November 1975 the Rexco operation. . ." (p. 18, lines 30-31) is misleading to the extent it would infer a difference between the operations by the Trustee and those of his predecessor conducted since August 1975 of which the Commission was fully aware.

2/ See In re REA Express, Inc., f/k/a Railway Express Agency, Inc., Bankrupt, No. 75-B-253, Orders of John J. Galgay, Bankruptcy Judge, dated November 7, 1975, December 8, 1975, Jan. 5, 1976, Feb. 5, 1976, Feb. 26, 1976, Mar. 26, 1976, Apr. 21, 1976, May 27, 1976, June 21, 1976, July 13, 1976, Aug. 19, 1976, Sept. 23, 1976, Oct. 21, 1976, and Nov. 18, 1976.

Enforcement. At that meeting they were advised of the decision of the Trustee and the Bankruptcy Court to continue the Rexco division operation and the nature of the Rexco division operation was discussed. From that date, to and including at least July 28, 1976, the Trustee fully disclosed each step that it took, or intended to take, to representatives of the Commission.[1/]

Fourth, and perhaps most important, the Commission's own official records will show that the only time the Trustee was notified of any illegality in the operation of the Rexco division occurred on or about December 7, 1975 when, due to circumstances beyond the control of the Trustee, its statutory insurance coverage was cancelled by its insurance carrier. The Trustee immediately shut down the Rexco division completely, sought and did obtain statutory insurance coverage, worked in full cooperation with I.C.C. Staff members and did not resume operations until on or about December 16, 1975 after the Interstate Commerce Commission's appropriate section on insurance had been notified and had confirmed that it recognized that REA was properly insured and covered. At no other time has the Trustee ever been notified by the Commission of any illegality of any nature whatsoever in connection with his continuation of the operation of the Rexco division (which had actually commenced operations approximately

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1/ See also the Trustee's Brief dated Oct. 18, 1976 at pages 82-4 incorporated herein by reference.

3 months before he was appointed Trustee) before this Report and Order was issued.

Fifth, the fact of this cooperation became a matter of public record when the Interstate Commerce Commission presented a statement to the Bankruptcy Court on or about December 17, 1975 in which it stated its position at that time. (See the Commission statement annexed hereto as Appendix A, dated and served December 15, 1975.)

Sixth, in addition, in a series of telephone calls on, among other times, December 1 and December 15, 1975, January 13, 1976, February 5, 1976 and February 24, 1976, Counsel to the Trustee advised the Interstate Commerce Commission's then General Counsel of all current and proposed matters affecting REA's operating authority.

Seventh, on March 2, the Trustee and Counsel for the Trustee met at the Interstate Commerce Commission with Messrs. Cerra and Gould to advise that no specific buyer existed at that time for REA operating authority and that this was true in part because of the I.C.C.'s single purchaser suggestion and recommendation. The Trustee had received numerous substantial offers for individual segments or pieces of REA's authorities. Commissioner Rupert L. Murphy confirmed personally to the Trustee and his counsel on March 2, 1976 in his office at the Commission that he had ordered Arthur J. Cerra, Legal, Bernard A. Gould,

Enforcement and John Grady, Finance to act as a unit and to cooperate with REA's Trustee and that they were keeping him fully informed.

Eighth, in late April 1976, the Trustee had before him two proposals for the acquisition of REA's I.C.C. operating authority and, as soon as these proposals were firmed up to the point where they could be discussed, a meeting was scheduled and was held on May 5, 1976 at the Interstate Commerce Commission in the office of Arthur J. Cerra, General Counsel to the Commission. When Mr. Cerra was advised that there were two offers which would be presented to the Bankruptcy Court as quickly as possible he immediately called Mr. William Love of the Rail Operations Section and Mr. William Gibbald of the Motor Carrier Operations Section into his office so that they could participate in the discussion. It was quite obvious that those present were pleased and relieved by the subject matter of the meeting, the probable sale of all REA operating authority to a single purchaser who would revitalize full service nationwide express service. It became obvious that Mr. Cerra wished to give the good news to Commissioner Murphy personally and that he would be setting up a meeting to deal with the problems and possibilities that had been opened up as a result of the Trustee's disclosure of the existence of these proposals.

Ninth, the Trustee immediately proceeded to work with his counsel to prepare the appropriate order, application and exhibits scheduling the public hearing before the Bankruptcy Court for the sale of the operating authority.

Tenth, that order, application and exhibits were sent to the Interstate Commerce Commission on May 24 and an extra copy was sent to Mr. Cerra on May 25. On July 13 and July 28 letters were written to Mr. Cerra regarding the status of the hearings before the Bankruptcy Court. Over and above this correspondence, contact and cooperation with the Commission, phone calls were made to advise Mr. Cerra as to the status of the bankruptcy hearings at all stages. Specifically, phone calls were made on June 10, June 28, July 2, July 13, July 15 and July 16 when Judge Galgay issued his decision approving the Alltrans offer as in the best interest of the Bankrupt estate.

Eleventh, at no time prior to November 21, 1975 or after that date did any member of the Commission or its staff[1/] give the Trustee or his counsel any reason to believe that any part of the operation of REA by the Trustee was illegal in any way, except as stated in paragraph Fourth, supra. The only issue raised in November 1975, March of 1976, or at other times was the possibility of dormancy being in issue.

1/ The Bureau of Enforcement, as a party for the purpose of developing the record in the complaint cases, on August 4, 1976 (Ex. 17) did inform REA of the matters of fact and law to be presented and asserted by the Bureau. The Bureau acted as a party and not as the Commission. The Bureau did not assert that any and all operations were totally illegal and must stop immediately, pending the outcome of the investigation.

Twelfth, the conclusion that the past Rexco division operations, including those by the Trustee, have been in the nature of "willful" violations not to be considered as "good faith" or "under color of right" is inconsistent with and totally arbitrary in the light of other Commission proceedings where alleged unlawfulness of operations was an issue. Normally there are several steps in such proceedings: specifications of the nature of the alleged violations are given in the complaint, are provided in the assertions of fact presented by the Bureau of Enforcement, or are presented in the evidence of other parties. Next, a Commission decision is issued in which findings as to the unlawful nature of the operations are made and a cease and desist order entered. It is only after the entry of a cease and desist order which has been followed by continued violations that the Commission usually makes findings as to the "willfulness" of such violations. In this proceeding, the Trustee in Bankruptcy appointed by the Court assumed and continued the operations of the prior management which had been conducted with the full knowledge of the Commission following the Commission rebuff to challenges against the lawfulness of the operations. Here, no cease and desist order has issued and, in fact, the Trustee voluntarily caused an Embargo to be issued two days after he received the Commission's Report and Order. Said Embargo became

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In the Matter of	)	Bankruptcy No. 75-B-253
REA EXPRESS, INC., f/k/a Railway Express Agency, Inc., Bankrupt.	)	Order authorizing the trustee to continue to operate the REXCO Division of the Bankrupt.

STATEMENT FOR THE INTERSTATE COMMERCE COMMISSION CONCERNING ORDER, DATED DECEMBER 8, 1975, AUTHORIZING TRUSTEE TO CONTINUE TO OPERATE REXCO.

The Interstate Commerce Commission has been advised of the scheduling of a further hearing on December 17, 1975, with respect to the Court's order of December 8, 1975, which authorized the Trustee of REA Express, Inc., to operate the business of the REXCO division of the Bankrupt for an additional period of thirty days and to use the Trustee's general funds to obtain insurance coverage necessary for the operations in question. The Commission, by its undersigned attorneys, submits the following information to advise the court of recently filed litigation before this agency and to clarify the statements contained in paragraph 9, page 3, of the Trustee's application urging entry of the order of December 8, 1975.

First, this court should be made aware of the fact that several formal complaints have been filed with the Commission challenging the authority of the REXCO Division of REA to conduct the truckload operations and service it is

presently providing under its nationwide mileage Commodity Tariff 85, copies of which are attached.[1/] Since the Commission will decide the issues in the above matters, it would be inappropriate to express any opinion with respect to the merits of the court's order of December 8, 1975.

Second, the Trustee's application to the court requesting entry of the order of December 8, 1975, in paragraph 9 on page 3, inappropriately may have given the impression that the Commission has informally approved the continuance of REXCO's operations, that its representatives indicated concern about the demise of the Bankrupt because of the gap such a demise creates in the operation of an express company in the United States, and that they hope by keeping these rights in use, an ultimate purchaser for all the rights of REA may be found who would be willing to reinstitute express service.

The undersigned attorneys for the Commission met informally with the Trustee and his representatives on November 21, 1975, to ascertain whether he contemplated a sale of REA's assets and operating rights separately to

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1/ American Trucking Ass'ns., Inc. v. REA Express, Inc., Docket No. MC-C-8867 (filed December 5, 1975); Brada Miller Freight System, Inc. v. REA Express, Inc., Docket No. MC-C-8862 (filed November 26, 1975); and Schneider Transport, Inc. v. REA Express, Inc., Docket No. MC-C-8864 (filed November 28, 1975). Additionally, the American Trucking Associations, Inc. filed a Petition Seeking Dismissal of REA's permanent authority application (MC-66562 (Sub-No. 2314)) for want of prosecution and for cancellation of REA's related temporary authority (MC-66562 (Sub-No. 2308TA)). Also pending are protests to REXCO's Commodity Tariff No. 85 which proposes to extend the rates to include the transportation of various other commodities.

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several persons or as a complete package. Various hypothetical possibilities of carrier or non-carrier acquisitions were discussed as well as the virtues and pitfalls of each, including the questions of dormancy of REA's rights unless REXCO continued operations, the non-transferability of temporary authority licenses, the possible time requirements to process each type of application, and the possibility of being authorized to continue REA's temporary authority operations pending final approval of a permanent authority or acquisition. The sole purpose of this meeting was to advise the Trustee that the Commission was available to assist him by specifying, prior to commencement of any case, the correct procedures to follow. He was advised to contact Director Brooks of the Commission's Office of Proceedings for such assistance and to contact either of the undersigned for any other inquiry that may arise.

Indeed, it was specifically stated that no substantive suggestions would be made nor would any informal opinions concerning substantive matters be expressed; as, for example, which, if several purchasers were available, would be more likely to succeed. We expressed our views that the Commission would ultimately have to decide whether the public interest required the continuation of express service in the absence of REA, the only known express company under the provisions of the Interstate Commerce Act.

Finally, this statement is filed to clarify the situation, not to contest the Trustee's statements. We recognize the many problems facing the Trustee and again assert that the Commission stands ready and willing to assist the Trustee in any procedural advice he may need. Since the Commission will be required to rule on the lawfulness of REXCO's operation in the litigation now pending before it, neither the agency, nor its representatives are in a position to discuss or express an opinion on that subject matter. We can say, however, that the Commission will endeavor to promptly decide the issues involved in the litigation pending before it after affording all parties due process in procedures it will designate.

Respectfully submitted,

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Deputy General Counsel

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Attorneys for the Interstate Commerce Commission

CERTIFICATE OF SERVICE

I certify that on the 15th day of December, 1975, I mailed a copy of the attached document, postage prepaid, to all parties of record.

Arthur J. Cerra
Deputy General Counsel

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BEFORE THE

INTERSTATE COMMERCE COMMISSION

No. MC-C-8862, et al.

BRADA MILLER FREIGHT SYSTEM, INC. v.
REXCO, INC. and REA EXPRESS, INC., ET AL.

PETITION OF ALLTRANS EXPRESS U.S.A., INC.,
INTERVENOR, FOR RECONSIDERATION

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Due Date: December 20, 1976
Dated: December 20, 1976

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BEFORE THE

INTERSTATE COMMERCE COMMISSION

No. MC-C-8862, et al.

BRADA MILLER FREIGHT SYSTEM, INC. v.
REXCO, INC. and REA EXPRESS, INC., ET AL.

PETITION OF ALLTRANS EXPRESS U.S.A., INC.,
INTERVENOR, FOR RECONSIDERATION

MAY IT PLEASE THE COMMISSION:

Petitioner, Alltrans Express U.S.A., Inc. respectfully prays the Commission to reconsider, vacate, set aside and reverse the Report and Order, served November 19, 1976, insofar as they pertain to (a) the dismissal of the application in No. MC-66562 (Sub-No. 2345, Part 181), and (b) cancellation of the temporary authority in No. MC-66562 (Sub-No. 2308TA). The cease-and-desist order against the Rexco Division operations has been fully complied with by the Trustee. The principal categories of error hereby excepted to are as follows:

(1) The Report's needless destruction of nationwide full-spectrum 1/ express service, in the face of Alltrans' good-faith proposal, previously filed and still pending, to render moot every ground cited for such destruction.

1/ i.e., general express service for all commodities and all sizes of shipments (package, small LTL, large LTL, volume, truckload, and carload), as distinguished from limited-commodity, small-package only, bus express, or other limited service.

(2) The erroneous assumption and pre-judgment, outside the issues, without supporting evidence, and contrary to fact, that no need exists for nationwide express service and that its destruction "will not be inconsistent with the public interest, the public convenience and necessity, or the National Transportation Policy" (Sh. 20-23).

(3) The violation of § 17(3), the National Transportation Policy, and the requirements of fair and orderly administration, in deliberately destroying full-spectrum express service on self-fulfilling grounds created by the Commission's refusal to act upon pending, prior-filed applications which, on their face, would moot those grounds.

(4) The arbitrary and capricious assumptions, contrary to fact and outside the issues: (a) that Alltrans proposes a new express service, and (b) that the public interest in the resumption and preservation of the full-spectrum express service provided by REA and its predecessors for nearly 100 years can feasibly be protected by resort to applications under §§ 210a(a) and 207 for new service authority (Sh. 17-18, 21-23).

(5) The arbitrary, capricious, and unwarranted dismissal of the application in Sub-No. 2345 (Part 181) (Sh. 20, 22-23).

(6) The arbitrary, capricious, and unwarranted cancellation of the Sub-No. 2308TA authority (Sh. 20-23).

(7) The arbitrary and capricious characterization of the Trustee's operations as "willful violations" without "good faith" or "color of right", and the use of such characterizations as the jurisdictional basis to deprive the Sub-No. 2308TA authority of the protections guaranteed by 5 U.S.C. § 558, and to totally deprive the public of the service thereby authorized (Sh. 19, 22).

(8) The numerous prejudicial denials of due process, the overruling of Alltrans' constitutional objections thereto, and the ruling that those constitutional objections have been "waived".

I.
The Needless Destruction Of Nationwide Full-Spectrum Express Service

The Report and Order, by dismissing the application in Sub-No. 2345 (Part 181) and canceling the Sub-No. 2308TA temporary authority,

would destroy authorities essential to the resumption in 1976 of nationwide general express service relied upon by the nation's public for over 100 years.

Such destruction was, and is, unwarranted and unnecessary. The findings asserted for dismissal of the application (Sh. 22-23) were (a) that it had not been prosecuted, (b) that the Trustee is not likely to be able to prosecute the application or conduct a feasible lawful operation, and (c) that the applications would be unsuccessful because the public convenience and necessity do not require the service. Apart from the intrinsic errors of fact, law and Due Process involved in these findings, discussed hereinafter, they did not require the Commission to dismiss the application, and thereby deprive the public of express service and the Trustee and REA creditors of properties worth a minimum of $9.6 million. The Commission had before it — and expressly mentions — the good-faith formal offer and emergency application of Alltrans Express U.S.A. in Nos. MC-F-13003 and MC-99388 (Sub-No. 11), filed September 27, 1976, almost two months prior to the Report, to substitute and prosecute the REA applications as applicant, and to conduct operations under the authorities which its president swore would be lawful and feasible. Moreover, Alltrans' application specifically mentions the probability of amendments and simplifications of the existing applications (which a Commission interested in resuming and preserving the public's service would unquestionably encourage).

The grounds advanced by the Report (Sh. 20-21) for cancellation of the Sub-No. 2308TA authority were:

(a) The dismissal of the corresponding permanent application;

(b) The Trustee's assumed lack of "operational capability";

(c) The alleged "unfitness" of the Trustee;

(d) The assumed "impracticality" of the "Hub" authority; and

(e) Alleged "diversions" of traffic from other carriers.

Apart from the intrinsic errors in such conclusions discussed hereinafter, they would not, even if valid, require that the authority be canceled or that the public thereby be forever deprived of express service. The Commission had — and still has — before it, the opportunity to discharge its statutory duty to act upon Alltrans' previously-filed good-faith formal offer and emergency applications to resume the operation of REA's pre-bankruptcy, lawful, full-spectrum express service, built around the Sub-No. 2308TA "Hub" authority, and thereby render moot each of the Report's grounds for cancellation of that authority. Alltrans did not, and does not, propose to operate the Rexco Division, or to operate in the same manner as Rexco. The cease-and-desist portion of the order would not require any alteration of the bona fide full-spectrum express service which Alltrans proposes. The Alltrans application shows clearly why the operation would be feasible.

The Report assumes — outside the issues, without supporting evidence, contrary to fact, and irrelevantly — that the "Hub" authority is intrinsically impractical, and, on the basis of that assumption, would order its destruction, in the face of the facts:

(a) That the "Hub" authority is the main-line authority around which virtually the entire REA surface operation for its last 8 years was structured;

(b) That, for 7 of those 8 years, it carried more shipments and served more shippers than any other carrier in the nation;

(c) That, despite inadequate working capital and other severe internal handicaps, and without any of Alltrans' unique advantages, it was operated at a profit in 1974;

(d) That it failed in 1975 only because of a crippling wildcat strike, the 1975 economic recession, and its inadequate working capital: and

(e) That Alltrans' management, with years of nationwide experience, is so certain of its operability as to risk $2.5 million in initial downpayment, $2 million in prosecuting applications, $9.6 million in minimum purchase price, and $20 million potential purchase price.

The Report's assumptions and cancellation are arbitrary and capricious actions which the Commission should, on further consideration, disavow and reverse.

II.
The Unsupported Assumption That Destruction Of Express Service Would Benefit The Public

The national public interest, the National Transportation Policy, and the Interstate Commerce Act command the Commission to preserve — not needlessly destroy — carrier services. The Report (Sh. 7-14) boasts of the Commission's recognition and dedication in the past to that duty to preserve express service for the nation's public, notwithstanding the existence of ordinary motor carrier service. But it then spoils that record by substituting an anti-public determination to destroy express service, based upon an assumed, pre-judged theory that the need no longer exists. Its assumption is erroneous as a matter of Due Process and as a matter of law, and is as factually invalid as if the Commission had suddenly arbitrarily assumed that no need exists for household goods carrier service. Among other errors:

(1) Neither the complaints against Rexco's operations, nor the petitions in the Sub-No. 2345 (Part 181) or Sub-No. 2308TA proceedings raised any such issue. On the contrary, all were careful not to give REA an opportunity to present a flood of evidence, including testimony by thousands of persons who depended upon express service. REA, Alltrans, and the public were thus deprived of any fair notice of any such issue.

(2) The presiding Administrative Law Judge specifically — and correctly — ruled at the hearing in these proceedings that the need for express service was not an issue upon which REA or Alltrans would have an opportunity to present evidence. 2/

(3) There was no evidence, much less proof, to support the Report's assumption.

(4) The assumption was irrelevant: lack of continuing need is not a lawful ground for revoking temporary authority which has come under the protection of § 558 of the Administrative Procedure Act (5 U.S.C. § 558). This Commission should not disregard the rights of parties in this manner, especially to achieve a goal so clearly contrary to the public interest and the National Transportation Policy as the destruction of the entire nationwide express mode of carrier service.

(5) The assumption is patently factually untrue: the nation's public depended upon REA's full-spectrum express service for the transportation for more shipments than any other carrier in the nation each year for 48 of the last 50 years, and prior to its bankruptcy, provided more service over more miles of route than any other carrier in the nation.

(6) The assumption is refuted by the Report's own admission (Sh. 12) that the public depended upon REA for 57.7 million shipments in 1965.

(7) The assumption is further refuted by the Report's admission that [despite the handicaps of inadequate working capital and serious inherited financial and other internal problems in its last two years preceding operations under the Bankruptcy Act] REA's express service was depended upon for 9.99 million shipments in 1973 and 8.96 million shipments in 1974, receiving $154.5 million and $165.8 million, respectively, in surface express transportation charges (Sh. 12-13).

2/ Tr. 346, 648.

(8) The assumption is further refuted by the fact that for the period January 1 - November 6, 1975, despite (a) a crippling wild-cat strike (which subsequently proved fatal to the Company). (b) the destructive recession during that period, (c) the severe financial, marketing, and operating handicaps of Debtor-In-Possession operation during all but one and one-half months of the period, and (d) a serious lack of adequate working capital, REA's surface express service produced operating revenues of $132,020,000.

(9) The Report's assumption is refuted by the Commission's persistent public findings and pronouncements in recent years (borne out by the published statistics) that the greatest problem in transportation was the transportation of small LTL shipments, and that REA's nationwide express service was the principal carrier of such shipments, as well as LTL shipments generally.

(10) The assumption is refuted by the Commission's consistent findings and rulings, year after year, that express service, in addition to providing needed scheduled, expeditious service for commercial traffic also carried by ordinary motor carriers, provided an essential service for many commodities, many sizes of shipments, and many shippers, which the ordinary motor carriers do not service adequately.

(11) The Report's assumption is refuted by the instantaneous outpouring in Nos. MC-F-13003 and MC-99388 (Sub-No. 11), of the greatest public demand in the Commission's history [viz. approximately 2,000 strong letters urging the Commission to immediately grant Alltrans' temporary approval to resume nationwide general express service] all of which were (and still are) sitting before the Commission, along with 1,200 sworn certifications of public support, in the Alltrans' applications which the Commission has ignored for the purpose of first destroying the authorities essential to the service.

(12) The Report's assumption is refuted by the fact, established by sworn verified statements in the Alltrans' § 210a(b) 3/ application, that REA's Trustee in Bankruptcy received approximately 25,000 local phone calls for service from a single city in the 9 months following the cessation, from persons who had not even heard of the bankruptcy or cessation of service, and was still receiving calls at the rate of 50 per day.

3/ See, Volume 1, p. A-11; Volume 2, Ex. A-2, pp. 13-15; and Appendix 1.

(13) The Report's patently erroneous assumption is further refuted by the evidence presented in the Alltrans' applications of the heavy patronage and rapid growth of the full-spectrum express service provided by affiliates of Alltrans in many other countries throughout the world. The effect of the Report's assumption is that all citizens of the United States, like citizens of some backward country would be deprived by fiat of a needed, superior type of service, in the face of Alltrans' willingness and ability to provide it. It would subordinate the national public interest to the selfish interests of a few ordinary motor carriers who, the Commission has found, neither do nor can provide it.

The Commission should set aside and reverse the Report and Order and find:

(a) That the issues of public interest, public need, or national policy for express service were not raised by the complaints or the petitions;

(b) That they are, therefore, not proper issues; and

(c) That, in any event, it would be inconsistent with the public interest, the public convenience and necessity, and the National Transportation Policy, for the Commission to destroy authorities essential to the resumption and preservation of the express mode of transportation, in the face of a previously filed, and still pending, good-faith application to resume and preserve such service.

III.
The Unlawful Manipulation Of Process To Achieve A Predetermined Result

These proceedings are not general investigations, but private complaints. They raise only 3 issues, all of them very narrow:

(1) Whether a cease-and-desist order should be issued against the Rexco Division operations and tariff on the ground that they were not bona fide express service;

(2) Whether the Trustee's application in No. MC-66562 (Sub-No. 2345, Part 181) should be dismissed for failure to prosecute; and

(3) Whether the Trustee's Sub-No. 2308TA temporary authority should be terminated by reason of such dismissal.

At the opening of the hearing herein on August 30, 1976, Alltrans Express U.S.A., Inc. advised the Commission of its offer, agreement, Bankruptcy Court approval, and forthcoming applications under §§ 5, 210a(b) and 207

> (a) For emergency authority to immediately resume and to later acquire and preserve REA's operation of nationwide full-spectrum express service, for which the Sub-No. 2308TA temporary authority was the absolute essential, and
>
> (b) To substitute as applicant in, and prosecute, all pending applications of REA, including the application in Sub-No. 2345 (Part 181).

The Alltrans Express applications in Nos. MC-F-13003 and MC-99388 (Sub-No. 11) were filed September 27, 1976, a month prior to initial briefs in these proceedings. Alltrans proposed to resume a normal, lawful, full-spectrum express service. It did not propose to operate the Rexco Division, or to operate in the same manner as Rexco. It proposed to prosecute all pending REA applications. It proposed to serve the public interest, spelled out in detail in strong letters from 2,000 shippers urging the Commission to grant immediate temporary approval for Alltrans to resume REA's former full-spectrum service. Approval of the Alltrans application for temporary approval would moot every issue in these proceedings! Moreover, the uncontrovertible sworn facts set forth in the § 210a(b) application satisfied on their face every statutory requirement for immediate temporary approval. Indeed, the subsequent destruction of the rights by the Report and Order herein expressly bears out the allegations of the § 210a(b) application.

Despite the public urging and the emergency nature of the applications, the Commission delayed even docketing them for 3 weeks, then issued its Notice of October 15, 1976 (still prior to initial briefs herein) refusing to discharge its statutory duties (a) to act upon them, (b) to protect the public interest in Alltrans' immediate resumption of the service and substitution as applicant to prosecute the pending REA applications, and thereby (c) to moot the issues herein. The Notice further announced that the Commission intended not to consider Alltrans' applications under the present proceedings were finally determined. On October 22 (still almost a month prior to service of the Report and Order herein), applicant filed an emergency petition pointing out, among other things, (a) the Commission's statutory duty to act, and (b) the fact that action on the application would moot the instant proceedings. Nevertheless, by order dated November 3, 1976 (still over 2 weeks prior to the Report and Order herein), the Commission reitterated its intention not to act upon the applications until after final determination of these proceedings. On November 19, 1976, the Commission served its Report and Order herein, wiping out express service on the grounds of conditions which the action required by the statute upon the prior-filed applications would have mooted.

Petitioner respectfully prays the Commission to abandon the course of action into which it has been led, and to stay any further action in these proceedings until it has acted upon and granted the good-faith, lawfully filed applications in Nos. MC-F-13003 and MC-99388 (Sub-No. 11), and thereafter dismiss these proceedings as moot.

IV.
The Erroneous Assumptions That Alltrans Proposes A New Express Service

The Report assumes (Sh. 17-18, 21-23), erroneously and apparently without any insight whatsoever into the actualities or the impracticality and prohibitive expense involved,— that Alltrans proposes a new nationwide general express service, and that § 210a(a) actually affords a feasible means of proving the urgent need for resuming nationwide, full-spectrum express service. The Report's assumptions would be untenable, even in the absence of the patent adverse pre-judging of the issues under § 210a(a) that is implicit in the result, as well as the language, of the Report and Order.

In the first place, contrary to the Report's utterly erroneous assumption (Sh. 22), Alltrans proposes to resume one of the nation's oldest and largest carrier services, not institute a new service! If new applications actually afforded a feasible vehicle for resuming nationwide express service, Alltrans would not have wasted a year of time and effort and a ready-made annual market of 9 million express shipments producing $160 million annual express revenues, and would not have thrown away nearly $300,000 of its resources in pursuing negotiations and making preparations to succeed a liquidating trustee. It would not have committed itself to a downpayment of $2.5 million; nor a guaranteed minimum rental-and-purchase price of $9.6 million; nor a potential rental-and-purchase price approaching $20 million; nor expenditures estimated at $2 million in prosecuting the REA applications. It did not undertake those commitments out of philanthropic affection for REA's creditors. If new § 210a(a) and § 207 applications had

offered a realistic basis for serving the great national need, Alltrans would have filed them in December, 1975!

The Report's assumption as to § 210a(a) indicates that the Commission may have lost sight of the fact that the vast majority of the many, many thousands of persons who depended upon express service are not the regular, constant-flow, continuing-need, commercial shipper, but small businesses and individual shippers, who need an expedited service of scheduled reliability (available from few, if any, ordinary motor carriers within their single authorities, and from none on a joint-line basis). Individually, many of these shippers — like individual shippers of household goods — do not require great frequency of service. Many — perhaps most — used express service only once or twice a year. But collectively — also like shippers of household goods — they need it constantly. For example, as shown by affidavits in Alltrans' § 210a(b) application, 4/ REA's Trustee in Bankruptcy received approximately 25,000 local phone calls for service in the 9 months following the cessation, from people who had not even heard of the bankruptcy or the cessation.

Apparently, the Commission likewise is not aware of the problems and expense of securing individual sworn certifications of support and details of past use and future need from this type of shippers, no one of whom individually accounts for a great traffic volume for proof of nationwide need. Apparently, the Commission has not considered the question of how many such witnesses would be required, from how many of the 26,000 express-

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4/ Volume 1, p. A-11; Volume 2, Ex. A-2, pp. 13-15, and Appendix 1.

service cities, towns or villages in the United States, to support new nationwide express service, in the face of protests by hundreds of individual ordinary motor carriers. Since the urgent needs and requests of 2,000 shippers have been ignored, would it require 10,000 witnesses to secure the Commission's attention? 20,000 witnesses?

It is true that much of the essential supporting revenue for full-spectrum express service must come from regular commercial shippers who also use ordinary motor carrier service, and need express service only for the shipments which require expedition, scheduled dependability, special care, etc. But, as the Commission once knew, the most urgent need for express service comes from those whom the ordinary motor carriers cannot or will not serve reasonably. It is hard to find a U.S. Citizen 30 years of age or over, who has never used REA express service. It has always served more shippers than any other carrier. But how many use it every year? The Commission's formal requirements of individual, sworn, shipment statistics, specified service failures, names of carriers tried, etc. for new temporary motor carrier applications, are simply not adaptable to those who comprise the vast numerical majority, as well as the most vitally affected portion, of the nation's public that depends upon nationwide express service, any more than to those supporting new household goods authority — and for the same reasons. Supplementary evidence of the aggregate volume, scope, and extent of past use of an antecedent express service by shippers generally — evidence which would not be available for a new § 210a(b) or § 207 application — is, as a practical matter, essential to successful prosecution

of any such application. In the absence of such evidence, the mere locating and accumulation of the necessary certifications of support for nationwide applications would cost millions of dollars, and the physical presentation of the witnesses millions more. Notwithstanding the enormous public need, no prudent carrier management would undertake such an expense. This is especially true now, in light of the Report's clear adverse pre-judgments.

A related error in the assumptions underlying the Report's permanent destruction of the authorities essential to nationwide full-spectrum express service is its failure to comprehend that full-spectrum express service, because of its generality, its provision of scheduled service, its expedition, and its intrinsic superiority, is one of the most demanding, the most difficult, the most complicated, and the most expensive types of property transportation service to provide, much less start up. This is the central reason that the original multiplicity of express companies long ago gravitated into a single nationwide operation. For the same reason, no new full-spectrum express company arose during the subsequent 40 years. Partially for the same reason, and partially because of the mechancial difficulty of evidentiary proof that is shared with household goods carriers, when bankruptcy terminated REA's full-spectrum express service, no serious carrier but Alltrans arose to undertake the enormous obligations and expense even of resuming the REA service, much less of starting up a new national full-spectrum express service. The situation was aggravated by the fact that, in the total absence of express service, some existing ordinary motor carriers had been able to seize the opportunity to enjoy, as a temporary,

last-resort service, the lucrative portions of the traffic formerly moving in express service, while still failing to provide the needed quality of service for the less lucrative portions upon which most users of express service depend (see the letters now before the Commission in No. MC-F-13003).

Only Alltrans Express U.S.A., Inc. was, and is, able and willing to undertake the obligations of resuming and preserving REA's full-spectrum express service. Alltrans is able to do so, only because of its fortuitous circumstance of having available, at the outset, a built-in source of a nucleus of supporting traffic from its freight forwarder subsidiary (Cf. § 418 of the Act), with which to resume scheduled express service. It is willing to undertake those obligations, and to pay $9.6 million or more for the privilege, only because Alltrans' management knows, beyond any doubt, that there exists an urgent nationwide public need for a strong, well-financed, and well-operated full-spectrum express service. As fully explained in its applications, that knowledge is solidly based: in part upon contacts with thousands of shippers who depended upon REA service; in part upon the requests some 2,000 of those shippers have presented to the Commission urgently seeking Alltrans' proposed service; in part upon its own management's years of experience in attempting to compete with REA for traffic requiring express service; and in part upon the experience of its affiliates in successfully providing full-spectrum express service to meet identical public needs in various other countries elsewhere throughout the World. To decree, upon mere unsupported assumption, as does the Report, that all citizens of the United States are, like citizens of some backward country,

to be deprived of that needed, superior type of service, in the face of Alltrans' willingness and ability to provide it, would be to subordinate the national public interest in favor of the interests of ordinary motor carriers, who, as the Commission has found, time after time, neither can nor will provide it.

The Commission is requested to disavow and reverse both of the assumptions assailed in this section.

V.
The Capricious Dismissal Of The "Hub" Application

The Report's premediated destruction of full-spectrum express service by dismissal of the "Hub" application and cancellation of the "Hub" Temporary Authority was neither warranted nor necessary. It could have been, and still can be, mooted by simply acting in the public interest by issuing to Alltrans temporary approval to prosecute the application and to resume and preserve the service.

To begin with, the Report's finding, in 1976, of "failure to prosecute" the "Hub" application is unfair, factually insupportable, and contrary to every legal concept of "failure to prosecute". Instead, the Commission should have found:

> (1) That the threshhold, basic essential to a lawful finding of "failure to prosecute" is an affirmative refusal or failure to comply with an order in the proceeding; this is true under the Common Law, the Federal Rules, and the Commission's Rules;
>
> (2) That neither REA, nor the Debtor-in-Possession, nor the Trustee ever did any affirmative act of refusal to prosecute, or failed to comply with any order in the "Hub" proceeding, under either docket number; the Report itself fails to cite any such act or order;

(3) That REA attended the only prehearing conference -- i.e. in 1970 -- at which the Chief Hearing Examiner ruled, without any objection from REA, that the Commission would issue an order assigning the proceeding for hearing some time in May, 1970, thereby assuming the initiative for processing the application;

(4) That, as the Report confirms (Sh. 20), the Commission never thereafter issued any such order assigning the matter for hearing, nor, indeed, any order compelling applicant to do anything;

(5) That, as the Report confirms, the Commission instituted, in lieu of such an order, a deliberate, open policy of "forbearance" from processing the proceeding, from January 1970 to November 19, 1976;

(6) That the Commission failed to give REA, the Debtor-in-Possession, or the Trustee any notice whatsoever, prior to the Report and Order of November 19, 1976, that the Commission's "forbearance" could no longer be relied upon;

(7) That, further confirming that the Commission had assumed the procedural initiative (and thus further inducing continued reliance upon the Commission) the Commission, in January 1976, on its own motion, consolidated the obviously "live" "Hub" application with 192 other pending applications, assigned a new docket number to it, and extended the corresponding Sub-No. 2308TA temporary authority as required by 5 U.S.C. § 558, without any assignment for hearing (or even pre-hearing conference), or any notice or requirement of any action by applicant;

(8) That, the Commission never thereafter issued any order or notice requiring applicant to take any action to prosecute the application;

(9) That, instead, representatives of the Commission in numerous conferences over the period November 1975 through June 1976, assured the Trustee that the Commission would facilitate the transfer to a successor;

(10) That, at least under such circumstances, an applicant does not have an "affirmative duty" to demand a hearing or request dismissal, and the Report's finding of such a duty (Sh. 20) offends reason, basic considerations of fairness, and the law;

(11) Contrary to the Report's use of the concept, "failure to prosecute" is not a device for an agency to impose an ambush

penalty for an applicant's continued reliance upon the agency's extended failure to act upon an application before it;

(12) That, contrary to the Report's use of the concept, "failure to prosecute" is not a matter of "intention" — especially imputed intention —, but requires an affirmative failure or refusal to comply with an order in the proceeding;

(13) That, apart from its legal irrelevance, the Report's imputation (Sh. 20) of a "failure to prosecute" the "Hub" application from arguments made in 1971 in support of an application for alternative authority is factually insupportable. In the first place, the Commission itself construed them otherwise, as it (a) construed the Sub-No. 2308TA as in effect for 5 years after such alleged "failure to prosecute, and (b) consolidated and assigned new numbers to the application 4 years after such alleged "failure to prosecute". Moreover, the statements of intent to abandon the "Hub" authority were expressly made contingent upon grant of the irregular-route authority; the latter was not granted, but denied; REA continued nationwide operations under the "Hub" temporary authority for 4 years thereafter, providing more service than any other carrier in the nation;

(14) The whole question of intention to prosecute was rendered moot by the specific offer, agreement, and application of Alltrans and the Trustee to prosecute the application and preserve the service. Such is the very purpose of § 210a(b) and the long-established procedure of "substitution". It should not be used as an excuse to destroy a public service.

The Commission is requested to reconsider and reverse the entire discussion and finding respecting the dismissal in No. MC-66562 (Sub-No. 2345, Part 181). It is requested to find that no failure of any duty has been proved, that the proposed Alltrans substitution renders the question moot, and that the ATA Petition in said proceeding should be dismissed.

VI.
The Cancellation Of The Sub 2308TA Temporary Authority

The Report erred in law and fact, as well as in defeating the national public interest, in holding and ordering that the Sub-No. 2308TA should be

canceled (Sh. 20-23). In addition to what has gone before, the Commission should have found:

> (1) The only ground for such cancellation presented in the petition (and therefore the only ground within the issues) was the requested dismissal of the corresponding permanent application. Since, as shown above, such dismissal itself was unwarranted, the request for cancellation should be dismissed.
>
> (2) The cancellation of the Sub-No. 2308TA temporary authority on grounds other than dismissal of the corresponding permanent application would violate 5 U. S. C. § 558.
>
> (3) The Report's findings that the bankruptcy, cessation of operations, and liquidation of the vendor precludes fitness or ability to prosecute the corresponding application or operate the authorities, and therefore warrants their cancellation, is: (a) outside the lawful issues; (b) moot, in light of the pending Alltrans applications to prosecute and operate; (c) contrary to the language of § 210a(b); (d) contrary to a heretofore unbroken line of cases granting temporary approval under § 210a(b) to operate temporary authorities of liquidated bankrupts; 5/ and (e) the Commission's contemporaneous grants of temporary approvals under § 210a(b) to operate the rights of the liquidated Associated Transport, Inc. 6/

The Commission is requested to reconsider and reverse the entire discussion and order (Sh. 20-23) pertaining to the Sub-No. 2308TA authority and to dismiss the ATA petition with respect thereto.

5/ See, e. g., A & W Motor Lines - Purchase - E. E. Rountree, 38 M. C. C. 407 (1942); Charter Express, Inc. - Purchase - Saturn Express, Inc., No. MC-F-12570 (not printed) orders of July 16, 1975, February 12, 1976 and June 2, 1976. See also, Art Pape Transfer, Inc. - Purchase - Miller's Trucking & Rental, Inc., No. MC-F-12706 (not printed) corrected order of January 5, 1976; James H. Hartman & Son, Inc. - Pur. (Por.) - Piedmont Petroleum, Inc., No. MC-F-12378 (not printed) order of June 11, 1975; C & H Transportation Co., Inc. - Purchase (Portion) - Equipment Transfer, Inc., No. MC-F-11093 (not printed) order of March 8, 1971.

6/ e. g., No. MC-F-12956, Arkansas-Best Freight System, Inc. - Purchase (Portion) - Associated Transport, Inc., Thomas J. Cahill, Trustee in Bankruptcy, served October 12, 1976.

VII.
The Finding Of Willful Violations

In implicit recognition of the prohibitions under 5 U.S.C. § 558 against cancellation of the Sub-No. 2308TA authority on the grounds other than dismissal of the corresponding permanent authority, the writer of the Report renders (Sh. 19, 22) a monstrous finding that this prestigious official Trustee in Bankruptcy appointed by, and operating under month-by-month authorizations in, orders of the Bankruptcy Court of the United States District Court, was engaged in "willful violations" of the Federal Statute. The Commission should have found:

(1) That no question of "willful violation" was raised in any of these private complaints, and is outside the lawful issues;

(2) That there was no evidence of prior violations;

(3) That there was no evidence of prior warnings;

(4) That there was no evidence of cover-up or subterfuge;

(5) That there was no evidence of deliberate intent to violate the Statute;

(6) That the operations were inherited in tact from the Debtor-in-Possession, and were not then even subject to complaint;

(7) That the Rexco Tariff had been permitted to go into effect over the same objections as made in these complaints;

(8) That the Commission's field representatives had made a complete examination of Rexco records in November, 1975, without any indication of unlawfulness; any such indication would have resulted in immediate correction;

(9) That, beginning in late 1975, the Commission's General Counsel and Chief of Enforcement had continuing discourse with the Trustee and complete knowledge of the character of the

Rexco operations, without ever indicating that they might be unlawful; any such indication would have resulted in immediate correction;

(10) That, since the inherited Rexco operations were profitable to the Estate, the Trustee in Bankruptcy was legally required to continue them until advised by the Commission that they were unlawful or ordered by the Bankruptcy Court to discontinue them;

(11) That the Commission's General Counsel, in pleadings to the Bankruptcy Court, and when asked by the Federal Bankruptcy Court whether the operations were lawful, failed to indicate in any way that they were unlawful; any such indication would have resulted in immediate correction;

(12) That the Commission itself has consistently refused to define "express service", and instead merely listed a number of general, unspecific "indicia of express service", upon which to base numerous ad hoc rulings;

(13) That, each element of the Rexco operations was similar to one or more of the Commission's many pronouncements of lawful "express service";

(14) That the REA rights are geographically the largest and most complex route-system in existence; even the Commission was unable to supply a complete and accurate list of them, much less a complete or accurate map of them;

(15) That the deviations from authorized routes (e. g. parallel highways, service to 5 villages, etc.) were microscopically "de minimis";

(16) That, when the Commission, in this Report, issued its very first intimation that the Rexco operations might not be within the Commission's construction of "express service", the Trustee immediately ceased all operation;

(17) That, the ruling violates not only judicial precedent, but every past decision of this Commission that we have been able to find as to what constitutes "willful" violation;

(18) That to find "willful violation" here would be an "ambush" finding, and to use it as a basis for penalizing the creditors of REA, by destroying carrier properties worth $9. 6 million or more would be legally, equitably and factually insupportable;

(19) That the finding constituted unnecessary over-reaching. The Commission has consistently held that fitness of a vendor is not an issue in a § 5 proceeding, much less a § 210a(b) proceeding. Even if the Bankruptcy Court's Trustee were "unfit" — on its face a preposterous assumption! -- the § 210a(b) operation would terminate his operation of the rights, rendering the whole objection moot.

The Commission is requested to reconsider, set aside and reverse the findings of "willful violation", "unfitness", lack of "color of right", etc. and all similar characterizations.

WHEREFORE, petitioner ALLTRANS EXPRESS U.S.A., INC. respectfully prays the Commission (a) to reconsider, vacate and reverse the Report and Order insofar as they pertain to the application in No. MC-66562 (Sub-No. 2345, Part 181) and the temporary authority in No. MC-66562 (Sub-No. 2308TA), (b) to dismiss the petitions in said proceedings, and (c) take such further action as would enable petitioner to resume REA's bona fide nationwide full-spectrum express service at the earliest possible date.

Respectfully submitted,

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Due Date: December 20, 1976
Dated: December 20, 1976

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Before the

INTERSTATE COMMERCE COMMISSION

Washington, DC 20423

No. MC-C-8862
BRADA MILLER FREIGHT SYSTEM, INC. v. REXCO, INC. and
REA EXPRESS, INC.

No. MC-C-8864
SCHNEIDER TRANSPORT, INC. v. REA EXPRESS, INC.

No. MC-C-8867
AMERICAN TRUCKING ASSOCIATIONS, INC. v. REA EXPRESS, INC.

No. MC-C-8874
ASSOCIATED TRUCK LINES, INC. ET AL. v. REA EXPRESS, INC.

No. MC-66562 (Sub-No. 2345) (Part No. 181)
REA EXPRESS, INC. - PETITION OF AMERICAN TRUCKING ASSOCIATIONS, INC. FOR DISMISSAL OF APPLICATION

No. MC-66562 (Sub-No. 2308 TA)
REA EXPRESS, INC. - PETITION OF AMERICAN TRUCKING ASSOCIATIONS, INC. FOR CANCELLATION OF TEMPORARY AUTHORITY

JOINT REPLY TO PETITIONS OF BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS FILED DECEMBER 7, 1976

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DATE DUE: December 27, 1976

DATE FILED: December 21, 1976

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Before the

INTERSTATE COMMERCE COMMISSION

Washington, DC 20423

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REA EXPRESS, INC.

No. MC-C-8864
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No. MC-C-8867
AMERICAN TRUCKING ASSOCIATIONS, INC. v. REA EXPRESS, INC.

No. MC-C-8874
ASSOCIATED TRUCK LINES, INC. ET AL. v. REA EXPRESS, INC.

No. MC-66562 (Sub-No. 2345) (Part No. 181)
REA EXPRESS, INC. - PETITION OF AMERICAN TRUCKING ASSOCIATIONS,
INC. FOR DISMISSAL OF APPLICATION

No. MC-66562 (Sub-No. 2308 TA)
REA EXPRESS, INC. - PETITION OF AMERICAN TRUCKING ASSOCIATIONS,
INC. FOR CANCELLATION OF TEMPORARY AUTHORITY

JOINT REPLY TO PETITIONS OF
BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS
FILED DECEMBER 7, 1976

COME NOW Brada Miller Freight System, Inc. (hereinafter "Brada Miller"), George Transfer & Rigging Co. (hereinafter "George Transfer") and Kaplan Trucking Company (hereinafter "Kaplan") and file this Joint Reply in opposition to the various petitions* filed December 6, 1976, by the Brotherhood of Railway and Airline Clerks (hereinafter "BRAC"), whereby

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* Footnote on page 2

BRAC seeks to intervene and to request reconsideration and/or rehearing or further hearing and modification of the effective date of the Commission Order served November 19, 1976. Briefly stated, it is Complainants' position that BRAC's pleadings fail to satisfy the requirements of Rule 76 of the Commission's General Rules of Practice governing intervention and the requirements of Rule 101(d) governing the filing of petitions seeking reconsideration and/or rehearing. Lastly, Complainants contend that BRAC has shown no sufficient cause for the modification of the effective date of the Commission Order. In the event that the Commission permits BRAC's untimely intervention, the Complainants alternatively plead that the relief sought by BRAC should be denied in its entirety. In support thereof, Complainants respectfully state as follows:

I.

THE COMMISSION SHOULD SUMMARILY DENY BOTH THE PETITION OF BRAC FOR LEAVE TO INTERVENE AND THE MOTION OF BRAC FOR LEAVE TO FILE PETITION TO INTERVENE

Rule 72 of the Commission's General Rules of Practice requires that BRAC's petition seeking leave to intervene be

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* Motion of Brotherhood of Railway and Airline Clerks for Leave to File Petition to Intervene, Petition of Brotherhood of Railway and Airline Clerks for Modification of Effective Date of Commission Order, Petition of Brotherhood of Railway and Airline Clerks for Leave to Intervene, and Petition of Brotherhood of Railway and Airline Clerks for Reconsideration and/or Rehearing or Further Hearing

denied. As stated at paragraph (b), a petition for leave to intervene should not be filed after the proceeding is called for hearing "except for good cause shown." And, where intervention would cause a broadening of the issues, paragraph (c) requires the petition "be filed in season to permit service upon and answer by the parties in advance of the hearing." BRAC's pleadings fail on both grounds.

BRAC in its pleadings has wholly failed to show good cause to justify its untimely intervention. The various pleadings which led to the initiation of the above-entitled proceedings, including the ATA petition seeking revocation of REA's hub temporary authority and dismissal of the corresponding permanent applications, have been widely publicized in the trade journals, such as Traffic World, in the past year. Furthermore, they were a matter of public record and could have been viewed at the Commission at any time during the interval of nine months between their filing and the commencement of oral hearing. BRAC's simple failure timely to intervene in one of the most widely publicized recent Commission proceedings does not constitute compliance with Rule 72.

BRAC's intervention at this stage, contrary to the assertion at page 2 of its petition, will unduly broaden the issues before this Commission. BRAC's pleadings on their face reflect the obvious fact that they seek to introduce a new issue concerning alleged employee benefits long after the

hearing record is closed. Repeated factual representations are made which are not of record and therefore cannot be accepted as a basis for action by the Commission. Complainants further respectfully submit that the issue now raised is irrelevant and immaterial to the legal issues of whether the hub temporary authority should be revoked and the corresponding permanent application be dismissed.

BRAC's stated reason for desiring to intervene is its alleged concern, see BRAC Motion, p. 2, that the Commission may revoke REA's certificates of public convenience and necessity which it asserts, BRAC Petition, p. 2, "represent the principal asset of the bankrupt estate." It is further claimed, BRAC Motion, p. 1, that "BRAC has a substantial interest in these proceedings, especially since this Commission has ruled that the principal assets of the estate should be revoked." This statement greatly distorts the Commission's finding herein. As the Commission's Report and Order will verify, the Commission revoked only the "hub" temporary authority upon finding that REA for over eight years had failed to prosecute the corresponding permanent application and had in effect repudiated that authority. In addition, the Commission found that REA has absolutely no operational capability to perform any express service and that REA is not fit to conduct proper and safe operations. These findings clearly substantiate the Commission's actions in revoking the REA hub authority. Hence, the facts which BRAC now

seeks to introduce regarding the alleged adverse effect that the Commission's action in upholding the law will have on REA's former employees, are simply irrelevant and immaterial to the issues in these proceedings. There is absolutely nothing in the Interstate Commerce Act or the National Transportation Policy to suggest that the Commission must consider the interests of employees before revoking eight-year-old temporary authority. BRAC, which is trying to read the provisions of Section 5 into the instant case, is simply misinterpreting the Commission's statutory mandate.

Since BRAC cannot justify its failure timely to intervene and since the evidence it desires to introduce is new, broadens the issues heretofore tried and is wholly extraneous to any legal issue before the Commission, BRAC should not be permitted to intervene at this late hour. In any case, as will be further demonstrated, its petition seeking reconsideration and/or rehearing or further hearing sets forth no facts or arguments which are sufficient to warrant a conclusion different than that previous reached by the Commission.

II.

THE PETITION OF BRAC SEEKING RECONSIDERATION AND/OR REHEARING OR FURTHER HEARING IS WITHOUT MERIT

Initially, Complainants respectfully submit that the BRAC petition fails to satisfy the requirements of

Rule 101(d) which govern the filing of petitions seeking reconsideration in that no attempt has been made to specify with any particularity the matters claimed to have been decided erroneously. Nor has BRAC satisfied Rule 101(b), which requires the evidence to be adduced at rehearing or upon reopening must be stated briefly and must not appear to be cumulative. Also, an explanation must be given why such evidence was not previously adduced. As a review of the entire set of BRAC pleadings will show, the above rules have been totally ignored. Therefore, the BRAC petitions must be denied for failure to meet the threshold requirements of the Commission's rules.

Should the Commission decide to consider BRAC's petitions, Complainants submit that they are without merit. In the first place, BRAC bases its petition for reconsideration on the unwarranted assumption that the Commission's decision "by revoking all of the authority of REA Express and dismissing its pending applications, destroys the opportunity for successful emergence of the REA express service from the bankruptcy proceedings."* This contention, which openly misinterprets the Commission's decision by claiming a revocation of "all of REA's authority," also erroneously assumes that the only way a nationwide express service can be instituted is through REA's hub authority which REA itself repudiated. However, this contention was squarely rejected by the

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* BRAC's Petition for Reconsideration, p. 3.

Commission when it correctly recognized at page 22 of its Report and Order that Sections 210a(a) and 207 provide a way by which a nationwide general express service can be instituted. There is, of course, nothing to prevent Alltrans from filing such applications and proving that the public convenience and necessity require such a service.

Nor is there any factual basis, even outside of the record before the Commission, for the ipse dixit claim at page 2 of BRAC's petition seeking reconsideration that the bankruptcy proceedings "look toward the reorganization and continued operation of an express service employing substantial numbers of REA Express employees." REA's voluntary embargo of express shipments and the subsequent liquidation of all of REA's assets, including its terminals, furnishings and equipment, should make it evident to everyone except BRAC that REA's trustee has been liquidating, not reconstituting, its express service. Similarly, there is no basis for the suggestion that Alltrans' takeover would automatically result in the rehiring of substantial numbers of former REA employees. As the contract between REA and Alltrans shows, few if any former REA employees will be hired by Alltrans. As paragraph 6.6 of the contract states, ". . . neither Alltrans, its affiliates, nor the the operating authorities shall be subjected to any existing employment agreement or relationship of REA and/or TRUSTEE with any employee organization . . ." Paragraph 6.6 also provides that Alltrans during the first two

years shall "give qualified former employees of REA who were actively employed full time by REA as of November 6, 1975, preference for employment . . . to the extent permitted under existing labor contracts of Alltrans and its affiliates." Alltrans' present employees are represented by the International Brotherhood of Teamsters. Thus, even if Alltrans were to take over the authority, it has no obligation to BRAC to rehire any employees, much less the figure of 15,000* which BRAC claims are being affected.

Another erroneous assumption that BRAC advances is that the former REA employees have little chance of employment elsewhere where they can use their expertise. While it is recognized that this type of argument may be entitled to a certain amount of weight in rail merger cases where locomotive engineers with no other experience are forced into unemployment, the former truck drivers and dock-hands represented by BRAC are not faced with the same problem. These employees have skills which can readily be put to use by other trucking companies. It should be observed in this respect that BRAC has failed to mention how many, if any, of the former REA employees are still unemployed. Thus, its petitions fail to demonstrate with any precision a real interest in this proceeding.

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* Complainants ask the Commission to note that nowhere does BRAC set forth the actual number of employees that it represents that were employed full-time as of November 6, 1976. It is suggested that the actual number was far less than the "approximately 12,000" allegedly employed as of February 18, 1975.

As has already been discussed,* the Commission's decision to revoke the hub temporary authority and dismiss the corresponding permanent application rests on far more than the "technical" ground advanced by BRAC at pp. 3-4 of its petition seeking reconsideration. The Commission's decision is overwhelmingly supported by the evidence of record, the Commission's own rules and regulations concerning the processing of temporary authority applications, the Interstate Commerce Act and the National Transportation Policy.

III.

THE COMMISSION SHOULD NOT MODIFY THE EFFECTIVE DATE OF ITS ORDER SERVED NOVEMBER 19, 1976

By its petition BRAC seeks modification of the effective date of the Commission Order until after the final resolution of the REA bankruptcy proceeding or in the alternative until after the time has run for appeal following the filing of petitions seeking reconsideration herein.** It is Complainants' position that BRAC lacks the interest necessary

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* See supra, p. 4.

** Although it is not spelled out, BRAC apparently is only interested in that part of the Commission's Report and Order revoking the hub system temporary authority and not the Complaint proceeding. Complainants stress that even though the Rexco operations have been embargoed, the embargo notice specifically provides that if the Commission stays the effective date of its Order that Rexco may renew its operations. Complainants, therefore, request the Commission not to stay the effective date of either aspect of its Report and Order.

to sustain a request for such relief. Staying that portion of the Commission Order revoking the hub temporary authority and dismissing the corresponding permanent application will not aid BRAC or the former REA employees it purports to represent, because it will not result in the reinstitution of REA's express service and thereby the reemployment of the former REA employees. The only effect of staying its Order would be to reinstate indefinitely the unprosecuted permanent authority application. Since REA voluntarily ceased operations and liquidated its motor carrier equipment and facilities, it is in no position to recommence such express operations. The only actual operation which could be recommenced following grant of the stay requested by BRAC would be those of Rexco. Such operations were conducted not by former REA employees but by owner-operators, not members of BRAC.

CONCLUSION

For all the above-stated reasons, Complainants request the Commission deny the relief requested by BRAC in its various petitions.

Respectfully submitted,

BRADA MILLER FREIGHT SYSTEM, INC.
GEORGE TRANSFER & RIGGING CO.
KAPLAN TRUCKING COMPANY

Richard H. Streeter
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Their Attorneys

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BEFORE THE

INTERSTATE COMMERCE COMMISSION

NO. MC-C-8862
BRADA MILLER FREIGHT SYSTEM, INC. v.
REXCO, INC., AND REA EXPRESS, INC.

NO. MC-C-8864
SCHNEIDER TRANSPORT, INC. v. REA EXPRESS, INC.

NO. MC-C-8867
AMERICAN TRUCKING ASSOCIATIONS, INC. v.
REA EXPRESS, INC.

NO. MC-C-8874
ASSOCIATED TRUCK LINES, INC., et al. v.
REA EXPRESS, INC.

NO. MC-66562 (SUB-NO. 2345)(PART NO. 181)
REA EXPRESS, INC. - PETITION OF
AMERICAN TRUCKING ASSOCIATIONS, INC.,
FOR DISMISSAL OF APPLICATION

NO. MC-66562 (SUB-NO. 2308TA)
REA EXPRESS, INC. - PETITION OF
AMERICAN TRUCKING ASSOCIATIONS, INC.,
FOR CANCELLATION OF TEMPORARY AUTHORITY

REPLY TO PETITION OF ALLTRANS EXPRESS U.S.A., INC.,
FOR RECONSIDERATION, AND PETITION OF REA EXPRESS, INC., BANKRUPT,
C. ORVIS SOWERWINE, TRUSTEE, FOR RECONSIDERATION,
OR ALTERNATIVELY, REOPENING, FURTHER HEARING AND RECONSIDERATION

Comes now American Trucking Associations, Inc., (ATA or Complainant), and files its Reply to the Petitions of Alltrans Express U.S.A., Inc., (Alltrans) and REA Express, Inc., (REA or defendant) for Reconsideration and other requested relief in the above-styled proceedings.

Preliminary Statement

REA and Alltrans, while primarily addressing their petitions to the correctness of the Commission's findings regarding the willfulness of the violations committed by REA's Rexco division, the dismissal of the "hub" permanent authority application (No. MC-66562 (Sub-No. 2345)(Part 181)), and the dismissal/revocation of the "hub" temporary authority (No. MC-66562 (Sub-No. 2308TA)), also seek to raise issues which range from the propriety of the Commission's disposition of the complaint case to the post-decision good faith of the Trustee in terminating the unlawful/illegal operations prior to the effective date of the Commission's order requiring cessation. Rather than treat these issues as interrelated to the evidentiary findings of the Commission, we will treat them separately in order to show that the arguments presented are, in large part, wholly contrary to established law, and are more in the nature of caviling rather than substantive argument, wholly undeserving of any merit.

I

The Commission Properly Avoided The Procedural "Ambush" Laid By Alltrans And REA

Early in this proceeding, it became obvious that REA and Alltrans were attempting to lay a procedural "ambush" for the Commission. Throughout the entirety of the consolidated complaint proceeding, REA attempted to avoid having its operation scrutinized by the Commission by inter alia, seeking to avoid answering rather pointed and properly filed interroga-

tories,[1] and in seeking to avoid a hearing on the merits of the complaints and petitions.[2] Little comment need be made that the hearing in this proceeding consumed almost four weeks. As the record clearly shows, the majority of this time was utilized for cross-examination involving questions, the least of which involved an inquiry as to whether an elephant could fit through a freight car door. (TR 1390). These tactics were not without a purpose, for simultaneously Alltrans was preparing to file a massive purchase application[3] whereby it would attempt to moot

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[1] On May 19, 1976, Complainants' served specific and limited interrogatories upon REA, requesting that it identify by sub-number Commission authorization to traverse specified routes and serve various points. On June 21, 1976, REA, as its answer to the interrogatories, attempted to pass off an unofficial REA publication as such authorization. In response to this lack of candor and good faith, Complainants on June 23, 1976, filed a motion with the Commission, requesting the issuance of an order compelling more complete answers. By Commission order served July 29, 1976, REA was directed to answer Complainants' interrogatories. On August 16, 1976, REA filed Answers to Extent Possible, and admitted it could not identify any authority to permit lawful service at the points listed, or over the routes requested, even though REA, in fact, operated over the routes and served the various points, and, this is in spite of the fact, that REA's own "Waybilling Guide" lists three of the various points as places where REA does not provide service. (See Complainants' Post-Hearing Br. 33-4). This scenario is particularly enlightening when considering REA's allegation that it was never given adequate notice as to what operations could be considered to be illegal. (REA Pet. 10). Moreover, the lack of candor in responding to the interrogatories should weigh heavily against REA's claim that its actions have always been in good faith.

[2] REA "Petition for Reconsideration of Order of Commissioner Murphy, served July 29, 1976," dated August 19, 1976. Denied by Commission Order served August 24, 1976. See also, REA's "Further Petition for Reconsideration . . ." dated August 24, 1976.

[3] No. MC-F-13003, Alltrans Express U.S.A., Inc., - Contract to Operate and Purchase - REA Express, Inc., C. Orvis Sowerwine, Trustee in Bankruptcy.

the issues raised in the consolidated complaint case. Once filed, the application would have the effect of whipsawing the Commission back and forth procedurally between the separate complaint and purchase proceedings with the apparent hope that the Commission would either make a grave procedural error, or allow Alltrans to start operations in light of the hysteria Alltrans and REA were attempting to generate.

The Commission wisely did not become so entrapped but, rather, pursuant to Section 17(3) of the Interstate Commerce Act (Act)(49 U.S.C.A. §17(3)), determined to hold the Alltrans application in abeyance pending resolution of the complaint case. While Alltrans (Alltrans Pet. 2, 8-10) and REA (REA Pet. 28-9, 32) would characterize the Commission's actions as an unlawful manipulation of process, we would suggest that the Commission's action is totally supported by the Supreme Court's language in F.C.C. v. Schreiber:

> Section 4(j) of the Communications Act of 1934, as amended, 48 Stat. 1068, 47 U.S.C. §154(j)(1958 ed.), empowers the Federal Communications Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." This Court has interpreted that provision as "explicitly and by implication" delegating to the Commission power to resolve "subordinate questions of procedure such as the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions." Federal Communications Comm'n. v. Potsville [sic] Broadcasting Co., 309 U.S. 134, 138, 60 S.Ct. 437, 439, 84 L.Ed. 656. The statute does not merely confer power to promulgate rules generally applicable to all Commission proceedings, cf. Federal Communications Comm'n. v. WJR, The Goodwill Station, 337 U.S. 265, 282, 69 S.Ct. 1097, 1106, 93 L.Ed. 1353; it also delegates broad discretion to prescribe rules for specific investigations, cf. Norwegian Nitrogen Products Co.

v. United States, 288 U.S. 294, 321-322, 53 S.Ct. 350, 360-361, 77 L.Ed. 796, and to make ad hoc procedural rulings in specific instances, Federal Communications Comm'n. v. Pottsville Broadcasting Co., supra. (381 U.S. at 289 (1965)) (Emphasis added.)

It should be noted that the statutory text which the Court was interpreting is almost identical to the language used in Section 17(3) of the Act. It can hardly be said, in light of the above, that the Commission does not have an ability under the factual circumstances presented to avoid the procedural chaos that REA and Alltrans hoped to create. See, American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970).

II

REA Cannot Be Heard To Complain About
Its Misinterpretation And/Or Misplaced Reliance
On Representations By Commission Employees

REA attempts to give the impression that it detrimentally relied upon representations by Commission personnel that the Commission would cooperate with REA. (REA Pet. 9-13). By relating that numerous meetings and telephone conversations were held with Commission personnel, REA appears to be trying to weave a thread of estoppel into this proceeding. To give added credence to this theory, REA states that, "at no time prior to November 21, 1975, or after that date, did any member of the Commission or its staff give the Trustee or his counsel any reason to believe that any part of the operation of REA by the Trustee was illegal in any way . . ." (REA Pet. at 13, (emphasis in original)).

First of all, REA's attempt to find refuge in the Commission's assurances of cooperation is wholly misplaced and without merit.

> An employee of [sic] Interstate Commerce Commission, even the Secretary, is wholly without authority to bind the agency. Such an argument by the plaintiff has no validity since the Supreme Court has specifically held that the Commission is not bound by the opinion expressed by one of its employees, regardless of the employee's rank or authority. Thompson v. Texas Mexican R.R., 328 U.S. 134, 146 (1946); Minneapolis R.R. v. Peoria Ry., 270 U.S. 580, 585 (1926).[4]

Second, the Commission did not give any assurances to REA that no remedial action would be taken against them if their operations were ultimately found to be illegal. Indeed, the Statement by the Commission to the Bankruptcy Court on December 15, 1975, was very cautious not to express an opinion regarding the outcome of the complaint cases. (REA Pet. App. A). Moreover, the Commission disclaimed having given the court any impression that it sanctioned the Rexco operation; rather, the Commission stated that the Trustee inappropriately may have given such an impression in his application to operate the Rexco division.

Third, REA's assertion that it was never given any notice of illegality by the Commission defies reason. Initially, REA was placed on notice of potential illegal operations by the filing of complaints in November and December, 1975, calling to question the lawfulness of the Rexco operation.[5] The Commission could not at that time or thereafter, until evidence was properly placed before it, make any ruling on, or discuss the alleged illegality of Rexco's operation, much less issue a cease and desist order. Section 204(c) of the Act specifically demands that notice and hearing be afforded a defendant in a complaint case prior to the Commission taking action. (49 U.S.C.A. 304(c)). To have done

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[4] Braswell Motor Freight Lines, Inc., v. U.S., 1975 Fed. Car. Cases ¶82,567 (Dist.Ct. Tex. 1975).

[5] Complaints of Brada Miller Freight System, Inc., and American Trucking Associations, Inc., filed November 25, 1975, and December 5, 1975, respectively.

otherwise would have unlawfully prejudged the issues and denied REA fundamental due process. See, Frozen Food Express - Ind., and Ohio, 100 M.C.C. 369 (1966). It is ironic that REA would criticize the Commission for not, in effect, prejudging the issues in this proceeding before hearing (REA Pet 13-6, 34-5) and, at the same time, equally criticize and accuse the Commission of prejudging the matters before it. (REA Pet. 25).

REA's contention that the Commission could have viewed the operations of Rexco in Docket No.36285, Petition to Strike Tariff, Rexco Division, REA Express, Inc., is equally specious. By its order of April 12, 1976, in the above proceeding, the Commission clearly stated that such an approach would be improper because issues involving operating questions were matters before the Commission in the complaint cases and outside the scope of the tariff proceeding.

REA's attempt to cast blame for its failure to conduct lawful operations upon the Commission is indicative of REA's refusal to face the issues involved in this proceeding. Indeed, no explanation or argument is offered as to why REA refused to abide by the limitations of its regular route authority. It goes without saying that such authority does not permit operations wherever the "franchisee" may desire. The free and loose operations of the Rexco division, under the advice of experienced counsel, must be judged upon the facts presented at hearing. REA's search for a scapegoat upon which to blame the illegal operations should pursue an internal rather than an external course.

III

No Equities Attend Illegal Operations
Conducted By A Trustee In Bankruptcy Notwithstanding
Permission Of A Bankruptcy Court

Implicit in any temporary operation conducted by a Trustee in Bank-

ruptcy, pursuant to Rule 216 of the Bankruptcy Rules, is that the considered operations must be legal. Accordingly, the Bankruptcy Court's order of November 7, 1975, authorizing the Trustee to operate the business of REA specifically provided inter alia, that the Trustee ". . . take all action required by the rules and regulations of the . . . Interstate Commerce Commission and Civil Aeronautics Board[6] incident to such operation of the business . . ."[7] The fact that the Trustee operated Rexco pursuant to court permission certainly cannot be translated as giving sanction to the conduct of illegal operations.

The Commission should keep in mind that the Trustee specifically requested permission to operate the Rexco operation,[8] and vigorously defended the operation before the Bankruptcy Court as being a legal opera-

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6/ The Civil Aeronautics Board has likewise been subjected to REA's laxity in prosecuting its applications. On December 6, 1976, the Board issued a show cause order why REA's Air Freight Forwarder Application should not be dismissed. In finding that REA had failed to update its application, the Board stated: "Accordingly, no official action has been taken with respect to REA's application, and no party, including the applicant, has requested that the Board move forward with the authorization. Moreover, it appears highly unlikely that official action can now be effectively taken in this matter since REA is no longer an operating entity." After observing that REA has been adjudged a bankrupt and ordered liquidated, the Board concluded that "[I]n all these circumstances we tentatively find and conclude that REA's application . . . should be dismissed." Civil Aeronautics Board, Docket No. 22388, Order 76-12-23, REA Express, Inc., Order To Show Cause For Interstate Air Freight Forwarder Operating Authority. (41 Fed. Reg. 54013-4), December 10, 1976. (Emphasis added.)

7/ In The Matter Of The Express Company, Inc. (No. 75-B-252) Order Authorizing Trustee To Operate Business, Etc., dated November 7, 1975, at 2.

8/ In The Matter Of REA Express, Inc., f/k/a Railway Express Agency, Inc., Bankrupt. (No. 75-B-253) Application To Operate Rexco Division Of The Bankrupt, dated November 17, 1975.

tion, according to the Trustee's interpretation of relevant Commission cases.[9] The Bankruptcy Court's refusal to vacate its Order granting the Trustee permission to operate Rexco can only be considered as showing deference to the expertise of the Commission in resolving these matters, and nothing more. To even intimate such an inference only makes interesting reading on appeal.

The Trustee's act of shutting down the Rexco operation prior to the effective date of the Commission's Order is a rather hollow gesture. Rather than characterize this act as a showing of good faith, we would characterize it for exactly what it is; a post-decision realization that the highly visible Rexco operations were so blatantly illegal that they were best abandoned. Significantly, REA's petition, while contesting the Commission's finding of willfulness, never once discusses the established evidentiary facts which support the finding.[10] If the Trustee truly wants to make a good faith gesture, we would offer the suggestion that he return all the ill-gotten revenues of the Rexco division to the legitimate motor carriers which suffered the unlawful diversions of traffic. This, at least, would be some healing salve to the carriers which were financially damaged by the unlawful operation.

We urge the Commission not to be sidetracked by extraneous issues, and find that the Trustee, just as anyone else conducting a motor carrier opera-

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[9] In The Matter of REA Express, Inc., f/k/a Railway Express Agency, Inc., Bankrupt. (No. 75-B-253) Memorandum Of The Trustee In Opposition To The Motion Of Illinois-California Express Company, Inc., and Western Gillette Transportation, Inc. To Vacate This Court's Order Of December 8, 1975, dated December 22, 1975. (Attached hereto as Appendix.)

[10] See discussion, infra.

tion, is charged with a duty and a responsibility to conduct that operation in a lawful manner in conformity with the Commission's laws, rules, and regulations. Attempts to offer mitigating facts should be critically viewed in light of the massive established facts of record that show REA's contemptuous indifference to the legitimate requirements of this Commission.

IV

The Record Fully Supports The
Commission's Finding Of Willful Violations

REA, in challenging the Commission's finding of "willful" violations, would have the Commission view the term "willful" as an abstract word of art separate and apart from the established facts of record in this proceeding. REA's focus in stating that the operations were not conducted wholly in bad faith looks, apart from stating that the operations were conducted with permission of the Bankruptcy Court, solely to the Commission's lack of action in moving against the illegal operations at an earlier date. (REA Pet. 16-7). At no time does REA even address or challenge the unrebutted factual evidence which laid the foundation for the willfulness finding. Instead, it makes the bold and unsupported statement that the record neither supports nor justifies labeling the violations as willful. (REA Pet. 18).

Willfulness is a question of fact. Direct proof of a specific intent to commit the underlying act is not required. A finding of willfulness ". . . may be inferred from acts, conduct, and circumstances, and the inference may be drawn from a combination of acts and circumstances." United States v. Lowther Trucking Company, 229 F. Supp. at 816 (N.D. Ala., 1964).

It cannot be contested that REA or its personnel are novices in the motor carrier field. Thus, the unlawful operations conducted by REA can hardly be characterized as unwitting or accidental, nor can its actions even remotely be judged as being a result of a lack of knowledge or familiarity with the requirements of applicable law. The decision to conduct the Rexco operation in the grossly unlawful manner in which it was, in fact, conducted can only be viewed as a volitional act made with full or constructive knowledge of the consequences.

As the Supreme Court stated in U.S. v. Illinois Cent. R. Co., 303 U.S. at 243 (1938), " . . .[willfulness] is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." A more apt description of the conduct and attitude of REA would be hard to find. If REA were not contemptuous or indifferent to the Commission's statutory requirements, why else would the record upon which the Commission based its decision show that:

> . . . no one in the management of Rexco is familiar with the overall scope or limitation of REA's operating authority; no attempt is made to see that service is performed to and from authorized points (with the exception of some points west of Dallas); no attempt is made to see that drivers travel authorized regular routes or to instruct them to use such routes; no responsibility is taken for control of drivers or shipments after pickup; no attempt is made to insure the expeditious movement of any shipment; no attempt, other than completion of paperwork, is made to insure the required operation of trip-lease vehicles, the proper filling of drivers' logs, or the attendant proper observation of the Department of Transportation hours of service limitations; no attempt is made to insure that only commodities covered by its tariffs are transported; no attempt is made to transport less-than-truckload or small package shipments; no attempt is made to use only ordinary van equipment; no attempt [illegible]

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> to see that proper express receipts or other tariff requirements are followed; and no attempt is made to be knowledgeable of leasing or other regulations that would tend to be applicable to its method of operation.
>
> The record does show that the Rexco operations are not performed pursuant to any established schedule (a few movements have occurred on a regular basis); the operations are not conducted over regular routes; they do not move through or between terminals; they do not move at premium rates; they do not move in an expeditious manner; they often do not move in ordinary van equipment; they exclude the transportation of small parcels and less-than-truckload volume; they exclude the transportation of unusual type commodities; and they do not handle shipments requiring special care. In short, the record shows that Rexco operates, in effect, simply as a broker of irregular-route transportation of truckload quantities and, under these circumstances, no conclusion can be sustained other than that Rexco's operations are and have been beyond the scope of REA's underlying authority. (Report at 18-9.)

The suggestion that the above Commission findings reflect an "unwitting" failure to comply with applicable laws, rules, or regulations, is an insult to the intelligence and expertise of the Commission, particularly since the Commission went on to state that, "The Rexco operations have been totally illegal . . . ." (Report at 19.)

If the Commission grants reconsideration in this proceeding, we urge it to recognize once again that the massive evidence of illegal operations placed upon the record is totally unrebutted. REA's ability to rebut this evidence was in no way circumscribed by any ruling, in any form, by the presiding Administrative Law Judge. Thus, the above-quoted findings of the Commission, which REA leaves uncontested on reconsideration, conclusively establishes that the Commission was totally correct in stating that the proven violations were of a willful nature. Accordingly,

we urge the Commission to reaffirm its finding that the operations conducted by REA, through its Rexco division, ". . . have been in the nature of willful violations . . . ." (Report at 19.)

V.

The Commission Correctly Dismissed REA's "Hub" Permanent Authority Application For Want Of Prosecution

REA, quoting the Commission's finding, states that, "the Commission erred in dismissing the application on the ground that:

> This, we believe, places some affirmative duty on an applicant to prosecute or seek dismissal. Applicant has done neither. (REA Pet. 20.)

REA then suggests six reasons why the above finding is erroneous: (1) no hearing was ever set, after the prehearing conference; (2) no other procedural orders were ever issued; (3) REA couldn't dismiss the application because it needed the hub temporary authority; (4) the hub system was not the panacea REA originally thought it was; (5) the concept of express service changes and evolves; and (6) the Commission failed to give REA the authority it wanted. (REA Pet. 20-5.)

Significantly, the "This" which the Commission was referring to, and to which REA does not see fit to allude, is Rule 247(f) of the Commission's Rules of Practice. (49 C.F.R. §1100.247(f)). That Rule specifically provides that an applicant shall either timely prosecute its application or seek dismissal thereof. REA, in its continuing refusal to recognize that the Commission's rules apply equally to it, seeks to avoid any responsibility for failing to prosecute, and instead hopes to shift the cause for its dalliance upon the Commission.

First, REA's quote from the prehearing transcript (REA Pet. 20) that the Commission would set the application for hearing in May of 1970 attempts to give the impression that REA was anxiously waiting to move forward with its case. This, of course, ignores the fact that the application had previously been set for hearing on the very day the prehearing conference was held. Furthermore, as the record of that conference shows, REA was not ready to move forward, and could give no excuse for its hesitation. (For a more complete discussion, see Complainants' Post-Hearing Brief 67-73 incorporated herein by reference.) Thereafter, REA sat back and did absolutely nothing until 1971 when it repudiated the hub authority.

For REA to now assert that it did not move forward because it was waiting on the Commission to set the application for hearing is absurd. We would think that REA, in light of all the touting it now makes regarding the hub authority, would have, within a reasonable time after May, 1970, made an inquiry about the proposed hearing. As the Commission correctly stated, ". . .[Rule 247(f)] places some affirmative duty on an applicant . . . ." (Report at 20.) Rather, REA came back to the Commission in 1971, repudiated the hub authority, and requested entirely new authority,which was denied.[11/]

Second, REA's statement that the Commission falsely found that REA had repudiated the hub system in 1971 not only ignores the established facts of record in that proceeding, but is inconsistent with its own pleading. Indeed, REA states that the application for different author-

11/ REA Express, Inc., Application For ETA, 117 M.C.C. 80 (1971)

ity in 1971, ". . . might be considered as a 'repudiation' of the 'Hub' concept." (REA Pet. at 23.)

Third, after REA was denied permission to try another approach,[12] it continued to do absolutely nothing regarding the prosecution of the hub application. It knew it had the Commission in an extremely tenuous position. The Commission could not, under the circumstances, demand that REA immediately move forward with the prosecution of the hub application because to do so would possibly contribute to REA's demise. No such reasons now exist. REA's demise is now an established fact. The singular reason why REA now defends the workability of the hub system, notwithstanding prior repudiation, is that the authority is considered a valuable article of commerce.

Fourth, REA's statement that it had to operate under temporary authority because the Commission would not give it adequate permanent authority defies all reason. (REA Pet. 25.) First of all, temporary authority is not intended to be a substitute for permanent authority. REA was under a duty to either prosecute or dismiss the hub application. Instead, it chose to abuse not only the Commission's Rules of Practice but the entire concept of temporary authority. Second, by stating that the Commission failed "to provide adequate, permanent authority" (obviously referring to the ETA case, supra), REA once again confuses its own obligations with those of the Commission. The Commission is not under a duty to give REA whatever it desires. If there was a need for different authority, REA, like any other applicant, necessarily should have come forward with adequate proof of a need for such service. As the Commission so appropriately stated in the ETA case, supra, "[w]e can

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[12] Id.

no longer accede to whatever operational scheme REA's management decides to be in its own particular interest." 117 M.C.C. at 88 (emphasis added).

Fifth, we will admit that REA's express service has been subjected to an evolutionary change. Apart from this, if REA, by its argument, is seeking to convince the Commission that express authority and the fact that it is bankrupt somehow gives it an unlimited license to engage in any type of transportation service it desires, we would refer them to New England Motor Rate Bureau Inc. v. United States, 254 F. Supp. 633 (D.Ct. Mass. 1966) aff'd., 385 U.S. 203 (1966), wherein the court stated:

> Nor can the meaning of that authority depend upon REA's financial circumstances. If REA is unable to survive on express business alone, this fact cannot create rights which it would not otherwise have. 254 F.Supp. at 635.

The above arguments which REA presents are so patently specious they should be rejected out of hand.

REA also argues that the Commission erred in finding that REA would have failed much sooner absent the Commission's forebearance of forcing REA to move forward with its repudiated hub application. It states that this finding prejudges the hub permanent authority application; ignores the need for such service, albeit unproven for over eight years; ignores the evidence found in the Alltrans proposal; and ignores the volume of shipments historically handled by REA. (REA Pet. 25-7.)

Initially, we would suggest that the Commission did not prejudge the hub permanent application, but rather merely relied upon the statements made by REA in the ETA case, supra, that the hub system was ill-conceived and had, in essence, become an albatross to REA. Second, no public need for the service has ever been offered. Indeed, there has been better than eight intervening years since the granting of that tem-

porary authority and, yet, no proof of need for the service has ever been shown. Third, the "evidence" in the Alltrans application has no relationship whatsoever to the Commission's findings regarding REA's abuse of the Commission's Rules of Practice. Moreover, adequate means are provided under Section 210a(a) of the Act, 49 U.S.C.A. §310a(a), by which Alltrans can secure express authority after the requisite showing of public need.[13] Nevertheless, we certainly cannot see how the Alltrans proposal can be a vehicle for making moot the illegal acts and omissions of REA, unless Alltrans uses the word "moot" as a substitute for "forgive and forget." Fourth, the fact that REA historically played a significant role in the transportation of freight has absolutely no bearing upon the factual circumstances of today.[14] REA has not operated for well over a year. Shippers which once may have used REA's service have now turned to more reliable carriage. In any event, the issue which the Commission decided was whether REA as a bankrupt and liquidated carrier could prosecute the hub application, (see, Gregg Cartage & Storage Co. v. United States, 42 F.Supp. 266 (N.D. Ohio 1941), aff'd. 316 U.S. 74 (1941)), not whether REA could find an alter ego to satisfy its burden of proof.

13/ Curiously, Alltrans in its Petition, pp. 11-6, argues that Section 210a(a) is not a feasible alternative. In support of this position, Alltrans explains the difficult burden of proof required under that section and Section 207 of the Act. Apparently, Alltrans forgets that the hub authority is only a temporary authority, the need for which still remains to be proven. In addition, if there is, as suggested by Alltrans-REA, such a massive clamor for the "unique" service Alltrans proposes, we fail to see why Section 210a(a) is not the most desirable and least expensive avenue for Alltrans to pursue.

14/ Nor does the Trustee's hearsay and self-serving statement that he still receives calls for service. (REA Pet. 27.) Accordingly, we request it be stricken.

Thus, the Commission properly dismissed the hub permanent authority application for want of prosecution and violation of the Commission's Rules of Practice; correctly determined that REA had repudiated the hub authority as being operationally unworkable; and correctly made subsidiary findings that REA, as a bankrupt and liquidated carrier, could not prosecute its permanent application.

VI

The Commission Properly Revoked The Hub Temporary Authority For Lack Of A Corresponding Permanent Authority Application And Correctly Found Ample Cause To Exist For Revocation On Independent Grounds.

As stated above, the Commission properly dismissed the hub permanent authority application. Accordingly, the Commission properly revoked REA's hub temporary authority, the existence of which depended upon the continuation of the permanent authority application. (49 C.F.R. §1101).

In addition, the Commission properly found ample cause to exist for revocation of the temporary authority independent of the Commission's dismissal of the permanent application.

REA states that its discussion at pages 9-19 of its Petition shows that the Commission's independent revocation of the hub temporary authority was erroneous. (REA Pet. 32.) As mentioned previously, REA does not, at any time, attack the specific factual findings of the Commission, findings which were based upon uncontroverted evidence. Nor does REA remotely argue that the Commission gave too much weight to the numerous and serious illegal activities of REA. Thus, standing alone, REA's entire argument amounts to little more than a plea for leniency based upon the facts that the operation was conducted by a Trustee in bankruptcy, and

that the Trustee needs the temporary authority to continue as a valuable article of commerce.

However, no support can be found under any doctrine, either court created or otherwise, that a Trustee, can, with impunity, disregard the limitations of the statutes which govern the license under which he is operating. Indeed, common sense and established law specifically reject such a premise. See, In Re Bay Ridge Inn, 94 F.2d 555 (CA 2 1938).

REA then argues that the Commission improperly found that REA has no operational capability to perform express service under the hub temporary authority. As justification for this position, REA states that the Commission totally ignored the Alltrans proposal, that Alltrans does have such a capability.

Initially, it has been over a year since REA conducted any legitimate express operations. All equipment, terminals, and other physical assets have been liquidated. All traditional REA employees have been released. Thus, REA, in an apparent admission that it truly does not have any operational capability to conduct express service, would seek to have the Commission look solely to a proposed purchaser to supply what REA itself lacks. No such obscuring of the proper issues before the Commission should be permitted. As previously discussed, supra, the Commission correctly avoided the procedural "ambush" which REA and Alltrans attempted to spring. Moreover, the Commission properly found by mere observation and knowledge of the industry it regulates that any service void which may have occurred due to REA's demise, has been filled by the Nation's responsive carrier system.

The needs of the public for express service are matters within the expertise and informed judgment of the Commission. The interests of the public, and the Commission's mandated concern for the stability of the motor carrier system should always transcend the schemes and desires of any single party. For the Commission to give any added weight to All-trans' proposal in this proceeding would be grossly unfair to Complainants, and would serve only to obfuscate the proper issues beyond recognition.

REA next alleges that the Commission erred in its independent finding that REA's improper operations, through its Rexco division, render it unfit to conduct proper and safe operations. (REA Pet. 34-5.) REA then offers the same or similar arguments it uses to allege that the Commission's finding of willful violations is erroneous. We have maintained, and continue to maintain, that these arguments are, in large part, specious.[15] See discussion, supra.

While the Rexco operations would be small by a shipment volume comparison to the legitimate operations that REA conducted in its heyday, the unlawful diversion, and attendant revenue loss, of over 6,000 truckload movements from legitimate motor carriers in the time span of little more than a year, certainly cannot be considered as insignificant,[16]

15/ As an added apparent error, REA states at 35 of its Petition that "(4) [sic] the Trustee had never received, even to today, a specific notice as to precisely what in the Rexco division operation was unlawful . . . ." (Emphasis added.) If this means that the Trustee is still unaware of what was unlawful about the Rexco operation, the Commission's discussion on pp. 18-9 of its Report and Order should give at least some indication of what was improper. In addition, the Commission's statement at 19 of its Report and Order that "The Rexco operations have been totally illegal . . .," certainly removes any necessity for speculation concerning what was unlawful. (Emphasis added.)

16/ We do not know now the exact dollar amount that Rexco unlawfully diverted from legitimate carriers. However, taking the lowest possible rates provided in the Rexco 85 tariff would show that the revenues diverted amount to $1,526,400 (16,000 at 159/cwt. x 6,000). No one can consider this figure to be insignificant.

particularly since the only operations that REA conducted during that period were performed by the illegal Rexco division.

REA next advances the argument that the Commission's revocation of the hub temporary authority is punative rather than remedial. (REA Pet. 36-42.) After alleging that the Commission failed to give adequate consideration to such things as the impact revocation has upon owner-operators and REA's creditors, REA states that:

> No attempt has been made, or could be made, to show that the specific violations alleged in the evidence . . . were representative of the entire operations of . . . the Rexco division . . . . No weight was given to the evidence regarding the termination of the employment of individual agents who were involved in connection with the specific violations . . . ." (REA Pet. at 36-7.)

While REA would choose to characterize the evidence of record as being non-representative of the Rexco operation, the record certainly does not support such a characterization. Indeed, all agent witnesses testified that: road operations were not conducted pursuant to any specified routes, a rather significant point when dealing with regular route authorities; no instructions were given to drivers save how to shuffle their "pay per work"; and that traffic could be solicited from or to any point in the United States with the exception of points west of Denver, Colorado.

The complete disregard of REA's governing tariff publications, which require the issuance of an express receipt, surely is representative of the crass disregard that REA (Rexco) has for the Commission's legitimate requirements. Even some of the scant documentary evidence that REA itself

introduced shows tariff violations.[17] REA's statement that no weight was given to evidence regarding termination of employees who were "involved" in the violations is curious, for the record does not contain any such evidence. It must be remembered that REA did not put any witness on the stand who even remotely knew anything about the Rexco operation, (see, Report 15 and 18) much less offer any explanation for its illegal conduct. Therefore, the record can only be said to speak for itself. REA's decision to rest without placing any rebuttal evidence of record demands that the Commission view the uncontroverted evidence of Complainants as established fact.

It is with these considerations in mind that we urge the Commission to reject REA's plea that the revocation of the hub temporary authority was punative. We would suggest that REA's reliance on other Commission cases regarding the nature of remedial action taken is misplaced. We are unaware of any operation under Commission jurisdiction that has ever been conducted in such a blatantly unlawful manner. To attempt to compare the "totally illegal" operations of REA with that of any other carrier is outlandish. Moreover, the illegal operations were conducted pursuant to temporary authority; authority which, by its very essence, contemplates strict compliance with Commission laws, rules and regulations. (49 U.S.C.A. §310a(c)).

Because REA pursued an extreme interpretation of the permissible scope of its temporary authority, and because such authority was only

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17 See REA Counsel's Exhibit 19, which shows a violation of Item 190 of the Rexco 85 tariff, wherein additional charges for a stop-in-transit were improperly assessed (TR 2236).

temporary, it should not be heard to complain when the Commission takes appropriate remedial action. The action taken by the Commission was wholly necessary to curtail the abuses which seemingly surrounded the hub temporary authority. No authority, let alone temporary authority, should be continued in existence when the holding carrier manifests little regard for its limitations. Moreover, the hub temporary authority is not protected by the "notice" requirements of Section 558(c) of the Administrative Procedure Act. (5 U.S.C.A. §558(c)). Great Lakes Airlines, Inc. v. Civil Aeronautics Board, 294 F.2d 217 (CA DC 1961), cert. denied, 366 U.S. 965 (1961). No denial of due process has befallen REA by the Commission's action in revoking REA's "temporary operating license." "Such permits or licenses may be revoked without 'another chance' and regardless of whether there is willfulness or whether the public health, interest, or safety is involved."[18] (See, also, 49 C.F.R. §1101.4, and recently amended 49 C.F.R. §1131.4.) Illegal operations, particularly those conducted under temporary authority, should continue to be looked upon a jaundiced eye.

CONCLUSION

Reduced to their main thrust, the petitions of REA and Alltrans amount to little more than a plea for the Commission to forgive and forget the blatantly unlawful operations of REA. The virtual entirety of the Alltrans petition merely puts forth reasons why Alltrans "full spectrum"

[18] Attorney General's Manual on the Administrative Procedure Act, at 91, quoted in support of the court's finding in Great Lakes Airlines, supra, that Section 558(c)(formerly Section 9(b)) of the Administrative Procedure Act imposes no stringent limitations of an agency's treatment of temporary authorities.

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theory of express service is the only salvation for the Nation's shippers. We maintain that the Alltrans proposal has nothing whatsoever to do with the illegal operations of REA, and, accordingly, request that it be given only cursory consideration.

What is important here is the massive uncontroverted evidence of record which shows conclusively that REA, through its Rexco division, engaged in illegal operations, the likes of which have never been seen. That evidence totally supports the Commission's conclusion that REA operated in willful disregard of the Commission's laws, rules and regulations. Likewise, the nature and extent of the illegal operations fully support the Commission's independent revocation of the hub temporary authority. These findings cannot be severed from the evidence of record, nor can they be treated or even viewed as being of a de minimus nature.

The Commission also was correct in dismissing REA's unprosecuted and repudiated permanent authority application and in revoking the hub temporary authority. That application had lain fallow on the Commission's docket for over eight years while REA conducted operations under temporary authority. Notwithstanding REA's clear repudiation of the hub system, there is no excuse that can aid REA in failing to comply with the clear requirements of the Commission's Rules of Practice. Even today, REA is unwilling to accept the fact that it does have a responsibility to prosecute its applications. Instead, it advances spurious arguments that the Commission, rather than REA, is somehow responsible for the lack of timely

prosecution. REA apparently only sees its responsibility as being able to deliver a valuable article of commerce to Alltrans, and, in this vein, requests the ability to prove the fitness of Alltrans to prosecute the stale application. We would hope that the Commission would pay little heed to these extraneous issues, and not have its attention diverted from the clear and established facts of record.

Wherefor, we respectfully request that on any reconsideration of this proceeding, the Commission specifically reaffirm each and every one of its prior findings, and specifically deny any further relief.

Respectfully submitted,

AMERICAN TRUCKING ASSOCIATIONS, INC.

Todd A. Peterman

Nelson J. Cooney
Robert L. James
Todd A. Peterman

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

In the Matter :

of : Bankruptcy No. 75-B-253

REA EXPRESS, INC., f/k/a :
RAILWAY EXPRESS AGENCY, INC.,

:

Bankrupt.

:

- x

MEMORANDUM OF THE TRUSTEE IN OPPOSITION TO THE MOTION OF ILLINOIS-CALIFORNIA EXPRESS COMPANY, INC. AND WESTERN GILLETTE TRANSPORTATION, INC. TO VACATE THIS COURT'S ORDER OF DECEMBER 8, 1975

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

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This memorandum is submitted by the Trustee in opposition to the motion of two motor carrier competitors to vacate this court's order of December 8, 1975 extending the authority of the Trustee to operate the business of the REXCO Division of the bankrupt.

FACTS

REA Express, Inc. ("REA") had, until its adjudication, been in operation for more than 100 years. Its origins precede those of the Interstate Commerce Act in 1887. Its

predecessor companies, including American Railway Express Company and others, had engaged in the transportation of both small package and full wagon loads of freight throughout various points in the United States prior to 1887.

In the early 1900's REA became wholly owned by railroads and operated under an agreement to which most of the country's railroads were parties. The agreement provided in essence that REA was the exclusive agent of the participating railroads for the conduct of their express business and that it should be, in essence, a non-profit organization.

As times changed so did REA change and it was allowed by its railroad agreement to select any transportation instrumentality, including motor carriers, operated by itself or others for the movement of the traffic it handled. For a fuller explanation of the various methods and authorities utilized by REA in connection with its operation, reference is made to REA Express, Inc.'s Application For Emergency Temporary Authority 117 MCC 80 (1971). It should also be noted that subsequent to 1969, REA was acquired by the management which operated it from then through its Chapter XI proceedings which commenced on February 18, 1975 to and including the date on which it was adjudicated. It is well known that REA under the 1969 management was under capitalized and, in

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spite of this handicap and others, it continued to maintain and handle all traffic tendered to it.

In early 1975 REA applied for and filed its REXCO tariff, a mileage commodity tariff. In spite of substantial opposition from the motor carrier industry, it became an approved tariff duly filed with the Interstate Commerce Commission and approved by it as an effective tariff on or about July 15, 1975.

Shortly thereafter, and with no working capital, the REXCO Division of REA under its approved tariff, commenced operations on or about August 15, 1975 and engaged in the movement of full trailer load lots of freight from point to point throughout the United States. Incorporated herein by reference is this court's order of November 17, 1975 and the application annexed thereto which gives detail as to the manner of the operation of the REXCO Division, the history of the tariff and the profitability of the division. Reference is also made to the order here in issue of December 8, 1975 which also continues the operation of the REXCO Division, which order is incorporated herein by reference.

Except during the time from December 8 to and including December 16, 1975 when, in response to an order obtained by

the Interstate Commerce Commission restraining REA temporarily from transporting property because of an alleged lack of statutory cargo, automobile and liability insurance, the REXCO Division has been operated profitably and has been the only profitable division of REA.

For this reason and also because of the Trustee's obligation and desire to maximize all assets of the bankrupt's estate including REA's ICC operating authorities, the Trustee has deemed it to be in the interests of the creditors and of the general public to continue to operate the REXCO Division and utilize REA's operating authorities to the extent possible to protect those operating rights from loss in value through disuse until such time as the Trustee is able to sell those operating rights and, possibly, the REXCO Division.

While it is true that REXCO's authority to operate is, presently under attack before the Interstate Commerce Commission, until such time as the Interstate Commerce Commission determines, if it ever does, that the REXCO Division is not operating under lawful authority; it is presumed and it is a legal operation under the REXCO mileage commodity tariff and REA's operating authority. The Trustee's exercise of his discretion and this court's exercise of its discretion were both based upon sound judgment consistent with Rule 216 of the Bankruptcy Rules of Procedure.

I

While this court has jurisdiction over all assets of the bankrupt's estate, in the exercise of its discretion, it should defer to the Interstate Commerce Commission for a determination of the Legality of the Operation of the REXCO Division of REA

The Interstate Commerce Commission, by its Deputy General Counsel, has submitted a statement to this Court dated December 15, 1975, advising that the Commission has received several formal complaints challenging the authority of the REXCO Division to conduct truckload operations.* The Commission has unequivocally stated that it will decide the issues raised in these complaints. The issues are identical to those raised in the instant motion.

Movants contend that the operation of the REXCO Division is illegal since it does not provide "express service". The argument in support of this contention is based in large measure on the theory that the REXCO Division does not satisfy the "requirements" for "express service" as set forth in Transportation Activities of Arrowhead Freight Lines, 63 M.C.C. 573 (1955), and therefore is operating in violation of the terms of the Certificates of Public Convenience and Necessity issued by the Commission to REA over the years.

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*American Trucking Ass'ns, Inc. v. REA Express, Inc., Docket No. MC-C-8867 (filed December 5, 1975); Brada Miller Freight System, Inc. v. REA Express, Inc., Docket No. MC-C-8862 (filed November 26, 1975); and Schneider Transport, Inc. v. REA Express, Inc., Docket No. MC-C-8864 (filed November 18, 1975). Additionally, the American Trucking Associations, Inc. filed a Petition Seeking Dismissal of REA's permanent authority application (MC-66562 (Sub-No. 2314)) for want of prosecution and for cancellation of REA's related temporary authority (MC-66562 (Sub-No. 2308TA)). Also pending are protests to REXCO's Commodity Tariff No. 85 which proposes to extend the rates to include the transportation of various other commodities.

It is apparent that movants have raised issues uniquely suitable for determination by a regulatory agency having the expertise essential to the initial determination of such issues. Here the inquiry is primarily one of fact and of discretion in technical matters requiring an acquaintance with the intricacies of transportation. Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285 (1922). A transportation problem of great magnitude is involved which requires the exercise of the Commission's primary jurisdiction. Armour & Co. v. Alton R. Co., 312 U.S. 195 (1941).

In Thompson v. Texas Mexican Ry., 328 U.S. 134 (1946) the Supreme Court required the Commission first determine the terms and conditions of an agreement concerning trackage rights prior to judicial consideration of the matter because:

> "These matters involve not only the interests of the two parties to the trackage agreement but phases of the public interest as well." 328 U.S. at 143. See also Smith v. Hoboken R. Co., 328 U.S. 123 (1946).

Most certainly the public interest is involved in the instant situation.

The movants have raised "... issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by that [the Interstate Commerce] Act." United States v. Western Pacific Railroad Co., 352 U.S. 59, 65 (1956).

The Court should avail itself of "... the enlightenment which may be had from a consideration of the relevant economic and other facts which the administrative agency charged with regulation of the transaction here involved is peculiarly well equipped to marshal and initially evaluate." Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp., 360 U.S. 411, 420 (1959).

The principle enunciated by the Supreme Court in Far East Conference v. United States, 342 U.S. 570, 573-575 (1952) is applicable here:

> "... in cases raising issues of fact not within the conventional experiences of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

We submit that the question of whether the REXCO Division is properly being operated by the Trustee in conformance with authority issued by the Commission is patently subject to initial resolution by the regulatory body which is most familiar with the authority in question. The issues posed raise questions concerning the customs and practices of

a particular industry and of a unique marketplace and should be dealt with in the first instance by those especially familiar with such matters. Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 305 (1973). Accordingly, the motion should be denied.

II

The Operations of the REXCO Division Are Not Illegal Unless and Until The Commision Declares Them To Be So

Should this Court decide that primary jurisdiction to resolve the issues raised by the instant motion does not lie with the Commission, it is REA's position that the motion should be denied on substantive grounds.

REA is a common carrier which, prior to the adjudication of bankruptcy, rendered "express service".

The REXCO Division of REA provides a truck or trailer-load service and was providing the same prior to the adjudication of bankruptcy.

The REXCO Division has been operating since July 15, 1975, the date on which its tariff (Commodity Tariff 85, I.C.C. 153) became effective. That tariff was filed on May 13, 1975 and was protested. However, Division 2, acting as an appellate division, voted not to suspend the protested tariff.* Suspension Board Case No. 63240 (July 14, 1975).

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*The Suspension and Fourth Section Board had concluded not to suspend the protested schedules, and the action of Division 2 followed the filing of an appeal for reconsideration of the Board's action.

The Commission was advised in Suspension Board Case No. 63240 that the REXCO Division would operate independently of REA (Affidavit of Donald W. Williams, June 30, 1975, p. 4).

Movants' argument that the operation of the REXCO Division is illegal since REA is no longer rendering "express service" assumes a definition of "express service" which does not exist.

Historically, the express business has had as its main object expedition:

> "The first consideration in an express service is the quality of the service itself ...." Maricopa County Commercial Club v. Wells Fargo & Co., 16 I.C.C. 132 (1909).

In the past it has not involved the use of any large amount of capital nor has it involved the use of the express company's own equipment. Kindel v. Adams Express Co., et al., 13 I.C.C. 475 (1908).

The hallmark, however, of express service is that it "... has kept in step with the times and changing conditions." Railway Express Agency, Inc., Determination of Status, 21 M.C.C. 161, 163 (1939).

An express company is no longer the agency of the railroads for doing a small parcel business, Express Rates, 24 I.C.C. 380 (1912) nor does it conduct the express service "... upon substantially all the lines of the railroad in the country, as well as upon steamboat lines, stage coaches, and other vehicles of carriage." Express Companies, 1 I.C.C. 349 (1887). If any definition of an express company is still

applicable it is that it is:

> "... a common carrier of property, but one of a special type. Essentially it is a carrier which assumes responsibility for carriage having certain special characteristics, and in the discharge of this function it very largely utilizes the services of other common carriers." Railway Express Agency, Inc., Determination of Status, 21 M.C.C. 161, 191-192.

The operations of the REXCO Division surely conform to this definition.

Commissioner Tucker, in his concurring opinion in Freight, All Kinds, L.C.L. Container Charges - U.S.A., 323 I.C.C. 468 (1964), decided after Transportation Activities of Arrowhead Freight Lines, 63 M.C.C. 573 (1955), recognized the fact that there is no statutory definition of express service. Id. at 489.

The Commission in Freight, All Kinds, L.C.L. Container Charges - U.S.A., supra, recognized that:

> "It is true that transportation conditions have changed over the years so as to permit ordinary freight carriers to improve their operations to the point where they are now in a position to provide service substantially equivalent to that of express. Thus the distinction between the two types of services has been blurred to some extent." 323 I.C.C. 483.

In Freight, All Kinds, L.C.L. Unitized Charges - U.S.A., 326 I.C.C. 594, 629 (1965) the Commission stated:

> "There is no limitation in any section of the Act to the type of traffic that can be handled by express companies. There were few complaints respecting the scope of REA's operating authority until the time that REA's rates became lower than those of the motor carriers and the freight forwarders."

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The Commission has also recognized that REA has historically handled shipments in ex cess of 500 pounds, including carload shipments. Id. at 481; see also Increased Express Rates and Charges, 1957, 304 I.C.C. 699 (1958).

Of even greater importance is the fact that not all of REA's certificates are restricted. As noted by the Commission in REA Express, Inc., Application for Emergency Temporary Authority, 116 M.C.C. 80 (1971), prior to 1952 all of REA's operating authorities were limited, in some manner, to the performance of service auxiliary to or supplemental of air or railway express service. REA then "... began a program of expansion into the all-motor field, made possible because REA combined its 525 rail-restricted certificates with some 1,100 non-restricted certificates or with each other." (Emphasis added.) Id. at 83. Still pending is REA's petition seeking removal of all "rail-haul" restrictions.

The Commission summarized REA's status by early 1968 as follows:

> "... REA operated as a motor carrier, free from the limiting factor of rail-haul restrictions; it could describe its own terminal areas for the performance of pickup and delivery services; and it could file rates for the transportation of volume traffic." (Emphasis added.) Id. at 84.

The movants cite the Commission's decision in REA Express, Inc., Application for Emergency Temporary Authority, 117 M.C.C. 80 (1971), in support of their position. Yet, the Commission there stated:

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> "... express service, whatever else it may be, must be performed as an expedited, regular route service which, in the usual concept, envisions a 'call-on-demand', unscheduled operation." (Emphasis added.) Id. at 89.

Certainly such language cannot be said to be unequivocal. The Commission has not declared the service presently being performed by the REXCO Division to be illegal nor has it ruled that such service does not constitute "express service".

Further, in the same decision the Commission noted:

> "Thus, REA has been well advised that its basic proposal contains inconsistent terms, and yet we still have not been presented with a rationalization for the inconsistency or any reason for this Commission to modify its previous standard of express service." Id.

The Commission may now be presented with such a reason. Since there are no decisions of the Commission extant from which this Court can determine the legality of the operations of the REXCO Division and the Commission has never been presented with a situation with regard to "express service" such as that which now exists, this Court should not foreclose an examination of the entire matter by the Commission which is instructed by Congress to exercise its jurisdiction over express companies, 49 U.S.C. § 1(3)(a), with a view to carrying out the stated purposes of the National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, and 1001, "... all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States,

of the Postal Service, and of the national defense".

In summary, while this court has jurisdiction over all the assets of the bankrupt's estate, in the exercise of its discretion, it should defer to the Interstate Commerce Commission for a determination of the legality of the operation of the REXCO Division of REA and this issue is already pending before the Interstate Commerce Commission.

Further, even if this court should conclude that it has primary jurisdiction over the issues raised by the operation of the REXCO Division those operations are legal unless and until the Interstate Commerce Commission declares them to be illegal. For this reason the fines and penalty provisions of the Interstate Commerce Act raised in Movants' memorandum are irrelevant and moot until such time, if ever, as the operation of the REXCO Division is held to be illegal by the Interstate Commerce Commission.

III

THIS COURT'S ORDER PERMITTING THE CONTINUED OPERATION OF THE REXCO DIVISION AND REA'S OPERATING RIGHTS WAS A PROPER EXERCISE OF ITS DISCRETIONARY POWER UNDER BANKRUPTCY RULE 216.

This Court in an Order dated December 8, 1975, authorized the Trustee of REA Express, Inc. to continue the operation of the REXCO division for a limited period of time. This Order was issued pursuant to Rule 216 of the Bankruptcy Rules of Procedure which provides,

> "The Court may authorize the trustee to conduct the business and manage the property of the bankrupt for such time and on such conditions as may be in the best interests of the estate and consistent with orderly liquidation thereof."

This Rule, consistent with Bankruptcy Act §2(a)(5), invests the Bankruptcy Court with broad discretion to allow a trustee to continue the operation of the bankrupt's business. As stated by the Court of Appeals for the Second Circuit;

> "This matter of continuing a going business till it can be determined whether or not such course will be for the best interests of all is so largely a matter of discretion confided to the Bankruptcy Court, that it would require a most extraordinary showing to persuade an appellate court to the conclusion that such discretion had been abused."
> In Re Isaacson, 174 Fed. 406. See also: In Re Cash v. Papworth, Crow-Sir, 210 F. 24 (2d Cir.); R.J. Reynolds Tobacco v. A.B. Jones Co., 54 F. 2d 329 (8th Cir. 1931).

Movants now come before this Court to ask that the operating Order for the REXCO division be vacated. They allege that the trustee's duty, under §47(a)(1) of the Bankruptcy Act, to expeditiously close up the bankrupt's estate has been "ignored" and that in effect, the Order of this Court was an abuse of discretion. Movant's position is, at the very least, myopic. While §47(a)(1) does require the trustee in bankruptcy to collect and liquidate the assets of the bankrupt's estate as expeditiously as possible, Bankruptcy Rule 216 recognizes that liquidation may not always be the most prudent course of action and that certain assets may become more valuable to the bankrupt's estate if the trustee is permitted by the Court to continue the bankrupt's business. I Collier on Bankruptcy (14th ed.) §

Movants cite one example justifying Rule 216 when they state that the trustee should be allowed to complete the manufacture of goods which were being completed at the time of the adjudication. Movants, however, fail to recognize the most important reason for the Rule: preservation of the going-concern value of the debtor or one of its assets. Thus it was stated in In Re Richter, 40 F. Supp 758, 759 (S.D.N.Y. 1941),

> "By virtue of [Section 2(a)(5)], the court has the power, in a proper case, to direct the continuance of a business for limited periods by a receiver or trustee. The purpose of any such operation, manifestly is to preserve a going business with the prospect of its sale, as such, to the greater

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advantage of the creditors."

And in In Re Delmonico's, 256 F. 414 (S.D.N.Y.), a receiver in bankruptcy of a famous New York restaurant, after three months of operating the business at an increasing profit, was granted leave to continue the business until sale or appointment of a trustee to replace the receiver. In this regard, Collier on Bankruptcy clearly states:

> "Occasion will often arise where a going business may be preserved and advantageously sold by keeping it alive under the management of an officer of the court. By clause [2(a)] (5), courts of bankruptcy are vested with ample power to that end." 1 Collier on Bankruptcy (14th Ed.) §§2.34 and,
>
> "continued operation may be authorized when it appears that the business could be sold as a going concern for a better price than an ordinary liquidation would produce ..." 12 Collier on Bankruptcy, (14th Ed.) §§216.04

The trustee is perfectly aware of his duty to wind up the bankrupt's business as expediously as possible, but the trustee is also aware of his duty to try to maximize the recovery to the creditors of the bankrupt. Thus, the trustee has determined that the liquidation value of the REXCO division and REA's operating rights is minimal compared to their potential value to the estate as a going concern. The reasons for this determination have been set forth at length in the trustee's applications to this court for authority to operate the REXCO division. In summary, the

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reasons are: the operation of the REXCO Division and REA's operating rights preserves the value of the REXCO Division; protects the debtor's operating rights from lapsing; and, in the period during which the Trustee continues to search for a buyer for the REXCO Division and the bankrupt's operating rights, the REXCO Division is expected to contribute earnings to the estate. It is hard to ascertain how any creditor, including movants, could argue that operation of the REXCO Division is not in their ultimate interest. The Court has wisely exercised its discretionary power under Rule 216 to continue the operation of the REXCO Division, and the Trustee therefore urges the court to preserve the value of the REXCO Division and REA's operating rights by not vacating its operating Order of December 8, 1975.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the motion of Illinois-California Express Company, Inc. and Western Gillette Transportation, Inc. to vacate this Court's

order of December 8, 1975.

New York, New York
December 22, 1975.

Respectfully submitted,

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Special Counsel to the Trustee

Of Counsel

Donald L. Wallace
J. A. Goldblum
Frank M. Buscaglia

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SERVICE DATE | CI 242

JAN 28 1977

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 27th day of January, 1977.

No. MC-C-8862

BRADA MILLER FREIGHT SYSTEM, INC., v. REXCO, INC., AND REA EXPRESS, INC.,

No. MC-C-8864

SCHNEIDER TRANSPORT, INC. v. REA EXPRESS, INC.

No. MC-C-8867

AMERICAN TRUCKING ASSOCIATIONS, INC. v. REA EXPRESS, INC.

No. MC-C-8874

ASSOCIATED TRUCK LINES, INC., ET AL. v. REA EXPRESS, INC.

No. MC-66562 (Sub-No. 2345) (Part No. 181)

REA EXPRESS, INC., PETITION OF AMERICAN TRUCKING ASSOCIATIONS, INC., FOR DISMISSAL OF APPLICATION

No. MC-66562 (Sub-No. 2308 TA)

REA EXPRESS, INC., - PETITION OF AMERICAN TRUCKING ASSOCIATIONS, INC., FOR CANCELLATION OF TEMPORARY AUTHORITY

Upon consideration of the record in the above-entitled proceedings, and of:

(1)(a) Motion and petition (treated as a single pleading) of Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC) for leave to file a petition to intervene and (b) accompanying petition for reconsideration and/or rehearing or further hearing and petition for modification of effective date of Commission order, respectively filed and tendered on December 7, 1976;

(2) Petition of C. Orvis Sowerwine, Trustee in Bankruptcy for REA Express, Inc., Bankrupt, defendant, filed December 13, 1976, for reconsideration, or alternatively, reopening, further hearing and reconsideration;

(3) Petition of Alltrans Express U.S.A., Inc., intervenor in opposition, filed December 20, 1976, for reconsideration;

(4) Motions (treated as replies) of American Trucking Associations, Inc., complainant-petitioner, filed December 20, 1976, to the pleadings in (1)(a) and (b) above;

(5) (a) Petition of Matthew E. Manning, et al., representing themselves and all other similarly situated for leave to intervene and (b) embraced petitions to vacate order and further hearing, respectively filed and tendered on December 20, 1976;

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(6) Joint reply of Brada Miller Freight System, Inc., et al., complainants, filed December 21, 1976, to the pleadings in (1)(a) and (b) above;

(7) Reply of Schneider Transport, Inc., complainant, filed December 27, 1976, to the pleadings in (1)(a) and (b) above;

(8) Replies of Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, filed January 4, 1977, to the pleadings in (4) above;

(9) Reply of American Trucking Associations, Inc., complainant-petitioner, filed January 10, 1977, to petitions in (2) and (3) above;

(10) Joint reply of Associated Truck Lines, Inc., et al., complainants, filed January 10, 1977, to the petitions in (1)(a) and (b), (2) and (3) above;

(11) Joint reply of Brada Miller Freight System, Inc., et al., complainants, filed January 10, 1977, to petitions in (2) and (3) above;

(12) Joint reply of Brada Miller Freight System, Inc., complainants, filed January 10, 1977, to the petitions in (5)(a) and (b) above;

(13) Reply of Schneider Transport, Inc., complainant filed January 10, 1977, to the petition in (2) above;

(14) Reply of Schneider Transport, Inc., complainant, filed January 10, 1977, to the petition in (3) above;

(15) Reply of Schneider Transport, Inc., complainant, filed January 10, 1977, to the petitions in (5)(a) and (b) above; and

It appearing, That in its petition for intervention, BRAC alleges a right to intervene herein at this time pursuant to Section 17(11) of the Interstate Commerce Act which reads as follows:

> Representatives of employees of a carrier duly designated as such may intervene and be heard in any proceeding arising under this Act affecting such employee;

that by its own admission appearing at page 2 of its motion for leave to file petition to intervene in (1)(a) above BRAC "was aware of these proceedings shortly before the hearing" and chose not to intervene because it concluded that it could not aid in the development of the record herein in that it was not knowledgeable as to the REA operations being challenged; that nevertheless its decision not to intervene was also made with the knowledge that the survival of the operating rights of REA's estate was in issue in the complaint proceeding and therefore it was aware that the interests of the workers it represents could be affected therein; that Section 17(11) by its terms, places the decision to intervene herein with BRAC as the duly authorized representative of REA's former employees; that along with the right of intervention conferred upon such a duly authorized representative by Section

17(11), there is an attendant duty to exercise that right responsibly; that with the actual knowledge possessed by BRAC before hearing in this matter, BRAC made an informed election not to intervene and knowingly relinquished any right of intervention herein under Section 17(11); that as the duly authorized representative of former REA employees, BRAC could and did relinquish their rights herein under Section 17(11); that therefore BRAC's petition for intervention is properly considered, along with that of Manning et al., in (5) (a) above, under the intervention rules of the Commission's General Rules of Practice;

It further appearing, That a review of their pleadings reveals that both BRAC and Manning et al., possessed actual and/or constructive knowledge of this proceeding such that, with reasonable diligence, they could have seasonably intervened herein; that in failing to do so they are not entitled to intervention at this time under Rule 72(b) of this Commission's General Rules of Practice; that in any event, a review of their various pleadings reveals further: (1) that they have not alleged sufficient facts to demonstrate their possible success herein to warrant the broadening of the issues of this proceeding that their intervention and request for further hearing would create; and (2) that even if the arguments in their tendered petitions were considered, they would not warrant a result different from that found by this Commission in its decision herein of November 17, 1976;

It further appearing, That nothing in our foregoing remarks should be construed to affect any rights of intervention which BRAC or Manning et al., might have in the REA-Alltrans finance proceeding in No. MC-F-13003;

It further appearing, That intervenor in opposition Alltrans argues on reconsideration that it was error for this Commission not to treat first its applications in Nos. MC-F-13003 and MC-99388 (Sub-No. 11) (1) for temporary authority under Section 210a(b) of the Act to operate under No. MC-66562 (Sub-No. 2308 TA), the so-called REA Hub temporary authority and (2) for substitution as applicant in No. MC-66562 (Sub-No. 2345 (Part No. 181)), the so-called Hub application for permanent authority, thereby, as is alleged by Alltrans, rendering moot the essential issues in this proceeding; that this Commission is vested with broad discretion under Section 17(3) of the Act to "conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice "/ see Akron, C. & Y. Ry. Co. v. United States, 22 F. 2d 196 (1927) and compare FCC v. Shrieber, 381 U.S. 279 (1965)/; that Alltrans' proposal in this regard was properly rejected in that to have followed its suggestion would have allowed the defendant to "transfer away" redress for its breaches of the Act and this Commission's rules and regulations alleged herein; that moreover, it should be pointed out that Alltrans can receive no greater interest in the involved Hub application and temporary authority than that of REA, together with any infirmities, both inherent or acquired, in connection with said application and authority; that in a very real sense the instant proceeding involved a determination of those interests and infirmities; and that in these circumstances, the disposition herein properly preceded disposition of the applications of Alltrans noted above;

It further appearing, That defendant challenges the Commission's findings of willfulness in the perpetration of

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the unlawful operations of its Rexco division attributed to defendant in the November 17, 1976, decision herein; that it argues that these operations were conducted under a color of right, and thus were not willful, in that said Rexco operations were performed (1) pursuant to approval of the REA Bankruptcy Court (United States District Court for the Southern District of New York) and (2) with the knowledge and, assertedly the acquiescence of the Commission through statements of its personnel and a statement filed with the Bankruptcy Court; that first, court approval of the continuation of the Rexco operations did not insulate defendant from the involved action /compare N.L.R.B. v. Baldwin L. Works, 128 F. 2d 39 (1942)/; that second, even if it is assumed that Commission personnel made arguably favorable statements concerning the Rexco operations, it is well-settled that the Commission cannot be bound by such statements and defendant cannot reasonably rely upon them such as to negate any willful aspect of its operations involved herein /see U.S.A.C. Transport, Inc. v. United States, 235 F. Supp. 689 (1964), aff'd. per curium, 380 U.S. 450 (1965)/; that the Commission's statement to the Bankruptcy Court referred to above indicated that the Rexco operations were under investigation, and for the Commission to have further qualified its statement would have been improper under the circumstances; that nevertheless, that statement certainly was not a condonation of Rexco's unlawful operation; that on the contrary said statement should have put a reasonable person acting in good faith on notice of the possible unlawfulness involved in those operations; and that finally, there is substantial and convincing evidence of record to support the finding that the involved operations were totally unlawful, demonstrating, at the very least, a lack of supervision or such disregard of statutory regulation irrespective of evil intent or erroneous advice, constituting willful behavior on the part of defendant /see Goodman v. Benson, 286 F. 2nd 896 (1961) and compare United States v. Illinois Central Railroad Co., 303 U.S. 239 (1938)/;

It further appearing, That defendant challenges the dismissal of the Hub permanent application based on (1) a prejudgment of the merits of said application with regard to (a) a public need for the service proposed and (b) defendant's fitness and (2) statements of repudiation of the operational feasibility and economy of the service proposal by REA in other proceedings before this Commission; that defendant argues that should it be decided that the above-mentioned issues of public need and fitness are at issue herein, defendant requests further hearing to adduce evidence as to those issues; that the above-referred to statements of repudiation are relevant herein on the issue of defendant's breach of Rule 247(f) of the Commission's Special Rules of Practice /49 CFR 1100.247(f)/ which states, in pertinent part, that "/a/n applicant who does not intend timely to prosecute its application shall promptly request dismissal thereof"; that said statements of repudiation are probative of REA's intent in this regard; that even though the Hub application was on file with the Commission for 8 years, the Commission did not thereby abdicate its duty to enforce Rule 247(f); and that the failure to dismiss the Hub application at an earlier date was based on this Commission's desire to allow REA every reasonably opportunity to develop a practical all-motor operation in light of REA's historically unique rail-related service; and that REA's attempt and failure to do so and its eventual bankruptcy cannot justify its breach of Rule 247(f) and thereby

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reverse the consequent dismissal of the Hub application;

It further appearing, That defendant contends that the Commission erred in revoking the Hub temporary authority in that prior to revocation, defendant, assertedly, was entitled to

(1) Notice by the agency /Commission/ in writing of the facts or conduct which warrant the action; and

(2) Opportunity to demonstrate or achieve compliance with all lawful requirements,

under title 5 USC Section 558; that this contention is not meritorious, in that the notice and compliance provisions of Section 558 above-noted do not apply to revocation of temporary authority /compare Great Lakes Airlines, Inc., v. Civil Aeronautics Board, 294 F. 2nd 217 (1961), cert. denied, 366 U.S. 965 (1961)/; that moreover, by the terms of Section 558, said notice and compliance portions do not apply "in cases of willfulness" and such a case is involved herein;

And it further appearing, That by order of the United States Court of Appeals for the Second Circuit of January 5, 1977, the Commission's decision herein of November 17, 1976, has been stayed pending jidicial review thereof; and good cause appearing therefor:

It is ordered, That the petitions in (1)(a) and (5)(a) above be, and they are hereby, denied for the reasons set forth in the first and second "appearing" paragraphs above.

It is further ordered, That the petitions in (1)(b), (5)(b), and (8) above, be, and they are hereby, rejected.

It is further ordered, That the petitions in (2) and (3) above be, and they are hereby denied for the reasons that the findings of the Commission in its report and order entered November 17, 1976, are in accordance with the evidence and the applicable law; and that no sufficient or proper cause appears for reopening the proceeding for reconsideration, for further hearing or for granting any of the relief sought.

By the Commission, Commissioner O'Neal concurring in the result. Commissioner Hardin did not participate.

(SEAL)

ROBERT L. OSWALD,
Secretary.

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Docket MC-C-8864
C.I. 1

BEFORE THE
INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C.

SCHNEIDER TRANSPORT, INC.	)	
v.	)	No. MC-C 8864
REA EXPRESS, INC.	)	

COMPLAINT

SCHNEIDER TRANSPORT, INC.

By

Daniel C. Sullivan
Anthony E. Young
H. Barney Firestone

Its Attorneys

Of Counsel:

SINGER & SULLIVAN, P.C.
327 South LaSalle Street
Chicago, Illinois 60604

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BEFORE THE
INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C.

COMPLAINT

SCHNEIDER TRANSPORT, INC.
2661 South Broadway
P.O. Box 2298
Green Bay, Wisconsin 54306

v.

No.

REA EXPRESS, INC.
219 East 42nd Street
New York, New York 10017

The Complaint of the above-named complainant shows:

I. That complainant Schneider Transport, Inc. is a corporation engaged in the business of the motor common carriage of property in interstate and foreign commerce. Such service is rendered pursuant to Certificates of Public Convenience and Necessity issued by the Interstate Commerce Commission in Docket No. MC-51156 and sub numbers thereunder and pursuant to temporary authorities issued from time to time by the Commission. Complainant's principal place of business is located at 2661 South Broadway, P.O. Box 2298, Green Bay, Wisconsin 54306.

II. That Defendant REA Express, Inc. headquartered in New York, New York is an express company and the holder of Certificates of Public Convenience and Necessity issued in Docket No. MC-66562 and sub numbers thereunder, operating in interstate and foreign commerce and as such, defendant is subject to the Interstate Commerce Act. Defendant REA Express has been ordered into forced liquidation by the U.S. District Court for the Southern District of New York by order of November 6, 1975.

III. That this complaint is filed pursuant to Sections 13, 204 (c), and 216 (e) of the Interstate Commerce Act, 49 U.S.C. § § 13, 304 (c), and 316 (e).

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IV. That said defendant is conducting operations through the vehicle of an operating division, Rexco, as an interstate common carrier by motor vehicle without appropriate authority from the Interstate Commerce Commission in violation of Sections 203 (c) and 206 (a) of the Interstate Commerce Act, 49 U.S.C. § § 303 (c) and 306 (a) in the manner and to the extent set out in the following paragraphs.

V. That defendant's operations in interstate and foreign commerce through the vehicle of its separate and distinct operating division, Rexco, organized August, 1975, constitutes an unlawful transfer of authority in violation of Section 212 (b) of the Interstate Commerce Act, 49 U.S.C. 312 (b).

VI. That Defendant's authority contained in Certificates of Public Convenience and Necessity MC-66562 and sub numbers thereunder authorize operation over regular routes in the limited authority of an express company, as defined by Interstate Commerce Commission case law.

VII. That Defendant REA Express, Inc. by Embargo Notice, November 7, 197 , ceased the pickup and receipt of shipments.

VIII. That Rexco as a separate and distinct operating division continues to solicit and transport selected traffic, during the liquidation of Defendant REA Express, Inc. the nominal holder of the underlying Certificates of Public Convenience and Necessity. These operations are not limited to operations in the provision of an express service over regular routes. They are indistinguishable from those of a motor common carrier of general commodities without limitation under Part II of the Act.

IX. That Rexco, a non-carrier has published rates in its own name as a division of REA Express, in Commodity Tariff 85, I.C.C. 153,

and supplements and amendments thereto in violation of Interstate Commerce Commission Regulations To Govern The Construction, Filing, And Posting Of Common Carrier Freight Tariffs And Classification Publications, Tariff Circular MF No. 3.

X. That the rates published by Rexco in Tariff 85, I.C.C. 153 are unlawful and in violation of the Interstate Commerce Act and in contravention of the National Transportation Policy for the reasons that such rates apply on services beyond those authorized to be performed by an express company under Part I of the Act and REA Express, Inc. under its Certificates of Public Convenience and Necessity, are unreasonable and non-compensatory in nature and constitute an unfair and destructive competitive practice.

XI. That the rates published by Rexco in Tariff 85, I.C.C. 153 establish various one factor rates applicable on minimum weights regardless of commodity and thereby nullify just and reasonable classifications required to be maintained under Section 216 (b) and 1 (4) of the Act § § 49 U.S.C. 316 (b) and 1 (4).

XII. That by reason of the facts stated in the foregoing paragraphs, complainant has been subjected to unlawful competition and diversion of revenue by defendant. That complainant is authorized to serve and has in fact served various shippers in the transportation of their commodities and in the area of service authorized complainant under its Certificates of Public Convenience and Necessity, which shippers are now being served by and whose traffic is being diverted to defendant in the unlawful manner described above.

WHEREFORE Complainant prays that defendant be required to answer the charges herein, that this complaint be set for hearing at Chicago, Illinois or Washington, D.C. or such other place as the Commission may determine, that the Commission order and set a period during which complainant may avail itself of discovery procedures following defendant's answer to this complaint of no less than two months, and that after due hearing and investigation an order be made commanding defendant to cease and desist from the aforesaid violations of said Act, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at Chicago, Illinois, November 26, 1975

Daniel C. Sullivan
Anthony E. Young
H. Barney Firestone

Its Attorneys

Of Counsel:

SINGER & SULLIVAN, P.C.
327 South LaSalle Street
Chicago, Illinois 60604

Docket MC-C-8864
C.I.2

SERVICE DATE

DEC 15 1975

INTERSTATE COMMERCE COMMISSION

WASHINGTON, D. C.

December 9, 1975

NO. MC-C 8864

SCHNEIDER TRANSPORT, INC.

-v-

REA EXPRESS, INC.

NOTICE TO DEFENDANT:

Herewith is a copy of a complaint filed with the Interstate Commerce Commission in the above-entitled proceeding.

Defendant is hereby called upon to satisfy the complaint or to answer the same in writing within twenty days from this service date.

Complainants contend that the relief sought is not a major federal action significantly affecting the quality of the human environment, within the meaning of the National Environmental Policy Act of 1969,

ROBERT L. OSWALD,

Secretary

Copy to:

Schneider Transport, Inc.
2661 South Broadway
P.O. Box 2298
Green Bay, WI. 54306

Daniel Sullivan
327 So. LaSalle St.
Chicago, IL. 60604

MC-C-8864
C.I. 3

BEFORE THE

INTERSTATE COMMERCE COMMISSION

- - - - - - - - - - - - - - - - x

SCHNEIDER TRANSPORT, INC., :

Complainant, :

v. : No. MC-C 8864

REA EXPRESS, INC., :

Defendant. :

- - - - - - - - - - - - - - - - x

ANSWER OF REA EXPRESS, INC.,
TO THE COMPLAINT OF
SCHNEIDER TRANSPORT, INC.

Respectfully submitted,

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and
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Co-Counsel to the Trustee

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Washington, D. C. 20005

Special Counsel to the Trustee

Of Counsel

Donald L. Wallace
Frank M. Buscaglia
John M. Cleary

BEFORE THE

INTERSTATE COMMERCE COMMISSION

- - - - - - - - - - - - - - - - x

SCHNEIDER TRANSPORT, INC., :

Complainant, :

v. : No. MC-C 8864

REA EXPRESS, INC., :

Defendant. :

- - - - - - - - - - - - - - - - x

ANSWER OF REA EXPRESS, INC.,
TO THE COMPLAINT OF
SCHNEIDER TRANSPORT, INC.

Comes now C. Orvis Sowerwine, Trustee in Bankruptcy of REA Express, Inc. (REA or Defendant) by his counsel, and answers the Complaint of Schneider Transport, Inc. (Complainant) as follows:

I

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph I of the Complaint.

II

Defendant admits the allegations set forth in paragraph II of the Complaint.

III

Paragraph III of the Complaint does not require an answer.

IV

Defendant denies the allegations set forth in paragraph IV of the Complaint to the extent such paragraph contains allegations to the effect that the operations of the REXCO Division of REA are being conducted without appropriate authority in violation of the Interstate Commerce Act.

V

Defendant denies the allegations set forth in paragraph V of the Complaint.

VI

Defendant denies the allegations set forth in paragraph VI of the Complaint.

VII

With regard to the allegations set forth in paragraph VII of the Complaint, Defendant admits that by Embargo Notice No. 1 issued November 7, 1975, it ceased the pickup and receipt of shipments. However, Defendant, by Amendment No. 1 to Embargo Notice No. 1 issued November 10, 1975, qualified the original Embargo Notice to emphasize that such embargo did not affect the operation of the REXCO Division.

VIII

Defendant admits that the REXCO Division of REA continues to transport traffic during the liquidation of

REA. Defendant further answers the allegations set forth in paragraph VIII of the Complaint by noting that the Bankruptcy Court having jurisdiction of REA's bankruptcy proceeding has issued several orders (November 17, December 8 and December 17, 1975) authorizing REA's Trustee to operate the REXCO Division.

Defendant denies all other allegations set forth in paragraph VIII of the Complaint.

IX

Defendant denies the allegations set forth in paragraph IX of the Complaint.

X

Defendant denies the allegations set forth in paragraph X of the Complaint.

XI

Defendant denies the allegations set forth in paragraph XI of the Complaint.

XII

Defendant denies the allegations set forth in paragraph XII of the Complaint to the extent such allegations state that Complainant has been subjected to unlawful competition and division of revenue by Defendant. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in paragraph XII of the Complaint.

WHEREFORE, Defendant prays that the Complaint herein be dismissed.

Dated Washington, D.C.

January 5, 1976

Respectfully submitted,

WHITMAN & RANSOM
522 Fifth Avenue
New York, New York 10036
and
MARCUS & ANGEL
60 E. 56th Street
New York, New York 10022

Co-Counsel to the Trustee

WISEHART & KOCH
219 East 42nd Street
New York, New York 10017
and
DONELAN, CLEARY & CALDWELL
Washington Building
15th & N.Y. Avenue, N.W.
Washington, D. C. 20005

Special Counsel to the Trustee

MC-C-8867
C.I. 1

FILE COPY

BEFORE THE

INTERSTATE COMMERCE COMMISSION

IN THE MATTER OF:

AMERICAN TRUCKING ASSOCIATIONS, INC., Complainant	)	
v.	)	No. MC-C- 8867
REA EXPRESS, INC., Defendant.	)	

COMPLAINT
OF
AMERICAN TRUCKING ASSOCIATIONS, INC.

Peter T. Beardsley
Robert L. James
Nelson J. Cooney
Attorneys

1616 P Street, N.W.
Washington, D. C. 20036

Dated: December 5, 1975

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BEFORE THE

INTERSTATE COMMERCE COMMISSION

IN THE MATTER OF:

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Complainant

v.

REA EXPRESS, INC.,
Defendant.

No. MC-C- 8867

COMPLAINT OF AMERICAN TRUCKING ASSOCIATIONS, INC.

Comes now American Trucking Associations, Inc. (ATA or Complainant) and files this Complaint against REA Express, Inc. In support thereof, ATA respectfully states:

I

ATA is the national organization of the trucking industry, representing all types of motor carriers of freight, both for-hire and private. It is a non-profit corporation organized and existing under the laws of the District of Columbia, with offices at 1616 P Street, N.W., Washington, D. C. 20036.

II

This Complaint is filed pursuant to the direction of ATA's Executive Committee as a result of action taken at its meeting held in Palm

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III

REA Express, Inc., (REA or Defendant) is authorized to operate as an express company pursuant to Parts I and II of the Interstate Commerce Act under a certificate of public convenience and necessity in Docket No. MC-66562 and various subs thereunder. It is a Delaware corporation with offices at 219 East 42nd Street, New York, New York 10017.

IV

REA has been in a Chapter 11 reorganization proceeding since February 18, 1975. By order signed by Judge Galgay, on or about November 6, 1975, it was adjudicated bankrupt and ordered to be promptly liquidated. In the Matter of REA Express Inc., Bankruptcy No. 75B253, So. Dist. N.Y. In an embargo notice No. 1, effective November 7, 1975, REA notified this Commission that it was placing an embargo against all traffic. In a later document, dated November 10, 1975, REA sought to revise its earlier embargo notice to except certain truckload owner-operator operations performed by the REXCO division of REA.

V

REXCO, a newly formed division of REA, is holding itself out to provide truckload service under its nationwide mileage Commodity Tariff 85, which was approved by the Commission on July 15, 1975. The tariff is designed for owner-operator traffic, states rates that cover linehaul movements, and provides accessorial charges for loading and unloading. The tariff excludes shipments requiring protective service, shipments containing live animals, birds or fish, and shipments containing a number of specified items of high value. Minimum weights provided in the tariff range from 16,000 to 40,000 pounds.

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VI

Since REA's certificates of authority are limited to the transportation of shipments moving in express service, REXCO's operations are patently in violation of REA's underlying certificated authority. It is clear from a review of Commodity Tariff 85 that the restricted service offered thereunder, particularly when limited to substantially less than a full service on all commodities in shipments of all sizes, is not "express service" as defined by the Commission and court decisions over the years. See Transportation Activities of Arrowhead Freight Lines, 63 M.C.C. 573 (1955) on remand from Arrowhead Freight Lines, Ltd. v. United States, 114 F. Supp. 804 (D. Cal. 1953); Railway Express Agency, Inc., Extension - Nashua, N.H., 91 M.C.C. 311 (1962), aff'd. Auclair Transp., Inc. v. U.S. and I.C.C., 221 F. Supp. 328 (D. Mass. 1963), aff'd. per curiam 376 U.S. 514 (1964); and Freight, All Kinds, LCL, Container Charges - U.S.A., 323 I.C.C. 468 (1964), aff'd. New Eng. Mtr. Rate Bureau v. U.S. and I.C.C., 254 F. Supp. 633 (D. Mass. 1966), aff'd. per curiam 385 U.S. 203 (1966).

VII

To the serious detriment of the certificated for-hire motor carriers and the shipping public in general, REA, through its REXCO division, is engaging in interstate operations without an appropriate certificate of public convenience and necessity issued by the Commission authorizing such operations contrary to and in violation of section 206(a)(1) of the Interstate Commerce Act, 49 U.S.C. §306(a)(1).

VIII

The relief sought in this proceeding will not have a significant effect on the quality of the human environment and does not require a "major Federal action" within the meaning of the National Environmental Policy Act of 1969.

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WHEREFORE, Complainant requests that this complaint be handled expeditiously, that a cease and desist order be issued forthwith against the Defendant as to the operations performed by its REXCO division, and that the Commission take such further action as it deems appropriate, including that envisioned by section 222(b)(1), 49 U.S.C. §322(b)(1), and possible intervention in the bankruptcy proceeding wherein the trustee must obtain the permission of the court to continue REXCO's operations, to ensure lawful compliance with the provisions of the Interstate Commerce Act.

Dated this 5th day of December, 1975.

Respectfully submitted,

AMERICAN TRUCKING ASSOCIATIONS, INC.

Peter T. Beardsley
Robert L. James
Nelson J. Cooney
1616 P Street, N.W.
Washington, D. C. 20036

Counsel for Complainant

MC-C-8867
C.I.2 2

SERVICE DATE
DEC 22 1975

INTERSTATE COMMERCE COMMISSION

WASHINGTON, D. C.

December 10, 1975

NO. MC-C 8867

AMERICAN TRUCKING ASSOCIATIONS, INC.

-v-

REA EXPRESS, INC.

NOTICE TO DEFENDANT:

Herewith is a copy of a complaint filed with the Interstate Commerce Commission in the above-entitled proceeding.

Defendant is hereby called upon to satisfy the complaint or to answer the same in writing within twenty days from this service date.

Complainant contends that the relief sought is not a major federal action significantly affecting the quality of the human enviromment, within the meaning of the National Enviromental Policy Act of 1969.

ROBERT L. OSWALD,

Secretary

Copy to:

Nelson J. Cooney
American Trucking Associations, Inc.
1616 P St., NW
Washington, DC 20036

Docket MC-C 8867
C.I.3

BEFORE THE

INTERSTATE COMMERCE COMMISSION

- x

AMERICAN TRUCKING ASSOCIATIONS, INC., :

Complainant, :

v. : No. MC-C 8867

REA EXPRESS, INC., :

Defendant. :

- x

ANSWER OF REA EXPRESS, INC.,
TO COMPLAINT OF AMERICAN
TRUCKING ASSOCIATIONS, INC.

Respectfully submitted,

WHITMAN & RANSOM
522 Fifth Avenue
New York, New York 10036
and
MARCUS & ANGEL
60 East 56th Street
New York, New York 10022

Co-Counsel to the Trustee

WISEHART & KOCH
219 East 42nd Street
New York, New York 10017
and
DONELAN, CLEARY & CALDWELL
Washington Building
15th & N.Y. Avenue, N.W.
Washington, D. C. 2005

Special Counsel to the Trustee

Of Counsel

Donald L. Wallace
Frank M. Buscaglia
John M. Cleary

Dated: New York, New York
January 9, 1976

860

BEFORE THE

INTERSTATE COMMERCE COMMISSION

AMERICAN TRUCKING ASSOCIATIONS, INC.,	:	
Complainant,	:	
v.	:	No. MC-C 8867
REA EXPRESS, INC.,	:	
Defendant.	:	

ANSWER OF REA EXPRESS, INC.,
TO COMPLAINT OF AMERICAN
TRUCKING ASSOCIATIONS, INC.

Comes now C. Orvis Sowerwine, Trustee in Bankruptcy of REA Express, Inc. (REA or Defendant) by his counsel, and answers the Complaint of American Trucking Associations, Inc. (Complainant) as follows:

I

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph I of the Complaint.

II

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph II of the Complaint.

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> "Effective 12:01 a.m., Friday, November 7, 1975, REA Express, Inc. placed an embargo against the pickup and receipt of all REA Express shipments. Express shipments tendered to REA prior to imposition of the embargo will be delivered.
>
> The purpose of this amendment is to emphasize that the embargo does not affect the operation of REA's Rexco Division. That Division is presently continuing its operations under the control of the undersigned Trustee."

Defendant further answers the allegations set forth in paragraph IV of the Complaint by noting that the Bankruptcy Court, having jurisdication of REA's bankruptcy proceeding, issued an Order Authorizing the Trustee to Operate the REXCO Division of the Bankrupt, a copy of which is annexed hereto as Appendix A and incorporated herein. In the Matter of REA Express, Inc., f/k/a Railway Express Agency, Inc., No. 75-B-253 (S.D.N.Y. issued November 17, 1975). The Order permits the Trustee to operate the REXCO Division for a period of thirty days following November 7, 1975, for the purposes set forth in the application annexed hereto.

The application makes clear that operation of the REXCO Division by the Trustee is in the best interests of the bankrupt's estate:

> ". . . it is manifest that it is of the utmost importance to the estate that the operation of the REXCO Division be maintained. As long as the REXCO Division operates the operating authorities from the I.C.C. owned by the Bankrupt and the Trustee, they are kept active and in use, thereby protecting such rights from loss through disuse and further protecting their value for an ultimate sale by the Trustee. The Trustee and its counsel have received a number of telephone calls from persons interested in acquiring either the operating rights exercised by REXCO or the entire REXCO operation. The Trustee believes that the continuance of the REXCO operation will not only enhance the value to the estate of the operating rights but will also make a modest contribution to the estate by way of profit realized during the Trustee's limited administration."

The Bankruptcy Court renewed the authorization set forth in its November 17, 1975 Order for an additional thirty days by Order dated December 8, 1975 and again by Order dated December 17, 1975.

V

Defendant admits the allegations set forth in paragraph V of the Complaint.

VI

Defendant denies the allegations set forth in paragraph VI of the Complaint.

VII

Defendant denies the allegations set forth in paragraph VII of the Complaint.

WHEREFORE, Defendant prays that the Complaint herein be dismissed.

Dated: New York, New York
January 9, 1976

Respectfully submitted,

WHITMAN & RANSOM
522 Fifth Avenue
New York, New York 10036
and
MARCUS & ANGEL
60 East 56th Street
New York, New York 10022

Co-Counsel to the Trustee

WISEHART & KOCH
219 East 42nd Street
New York, New York 10017
and
DONELAN, CLEARY & CALDWELL
Washington Building
15th & New York Avenue, N.W.
Washington, D. C. 20005

Special Counsel to the Trustee

Certificate of Service

I hereby certify that a copy of the foregoing Answer has been served by mailing a copy, via first class mail, postage prepaid to Peter T. Beardsley, Robert L. James, and Nelson J. Cooney, attorneys for the Complainant, 1616 P Street, NW, Washington, DC 20036 on this 12th day of January, 1976.

JOHN M. CLEARY

Docket MC-C-8874
CI. 1

BEFORE THE

INTERSTATE COMMERCE COMMISSION

ASSOCIATED TRUCK LINES, INC.,
ASSOCIATED TRANSPORT, INC.,
B & P MOTOR EXPRESS, INC.,
EARL C. SMITH, INC.,
EASTERN EXPRESS, INC.,
GREAT LAKES EXPRESS CO.,
HOLLAND MOTOR EXPRESS, INC.,
INTERSTATE MOTOR FREIGHT SYSTEM,
JONES MOTOR,
JONES TRANSFER COMPANY,
LONG TRANSPORTATION COMPANY,
McLEAN TRUCKING COMPANY,
RYDER TRUCK LINES, INC.,
STRICKLAND TRANSPORTATION CO., INC.,
U. S. TRUCK COMPANY, INC. and
UNITED TRUCKING SERVICE, INC.,

Complainants,

v.

No. MC-C-8874

REA EXPRESS, INC.,

Defendant.

COMPLAINT

REX EAMES
Attorney for Complainants

EAMES, PETRILLO AND WILCOX
900 Guardian Building
Detroit, Michigan 48226
(313) 963-3750

Dated: December 11, 1975

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BEFORE THE

INTERSTATE COMMERCE COMMISSION

ASSOCIATED TRUCK LINES, INC.,
ASSOCIATED TRANSPORT, INC.,
B & P MOTOR EXPRESS, INC.,
EARL C. SMITH, INC.,
EASTERN EXPRESS, INC.,
GREAT LAKES EXPRESS CO.,
HOLLAND MOTOR EXPRESS, INC.,
INTERSTATE MOTOR FREIGHT SYSTEM,
JONES MOTOR,
JONES TRANSFER COMPANY,
LONG TRANSPORTATION COMPANY,
McLEAN TRUCKING COMPANY,
RYDER TRUCK LINES, INC.,
STRICKLAND TRANSPORTATION CO., INC.,
U. S. TRUCK COMPANY, INC. and
UNITED TRUCKING SERVICE, INC.,

Complainants,

v.

No. MC-C-8824

REA EXPRESS, INC.,

Defendant.

COMPLAINT

NOW COME Associated Truck Lines, Inc., Associated Transport, Inc., B & P Motor Express, Inc., Earl C. Smith, Inc., Eastern Express, Inc., Great Lakes Express Co., Holland Motor Express, Inc., Interstate Motor Freight System, Jones Motor, Jones Transfer Company, Long Transportation Company, McLean Trucking Company, Ryder Truck Lines, Inc., Strickland Transportation Co., Inc., U. S. Truck Company, Inc. and United Trucking Service, Inc., sometimes hereinafter referred to as the "Complainants", by their attorney, Rex Eames, and make this Complaint against REA Express, Inc., sometimes hereinafter referred to as the "Defendant",

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and in support thereof respectfully represent as follows:

1. Each of the Complainants is a general commodity motor common carrier conducting operations in interstate and foreign commerce pursuant to Certificates of Public Convenience and Necessity issued by this Commission. Each Complainant has invested many hundreds of thousands of dollars in terminals, motor vehicle equipment and other facilities so as to provide adequate motor carrier service to the public within the scope of its authorities and operations. Each of the Complainants is conducting active operations pursuant to its Certificate of Public Convenience and Necessity and is engaged generally in the transportation of substantial volumes of both truckload and less-than-truckload traffic. Most, if not all, of the Complainants have suffered a substantial decline in their business activities because of the general recession that now affects the economy of this country.

2. Defendant REA Express, Inc. is an express company authorized to conduct operations in interstate and foreign commerce under Parts I and II of the Interstate Commerce Act pursuant to authority granted in Docket No. MC-66562 and related Sub numbers. For some time the Defendant had been operating as a Debtor-in-Possession under Chapter XI of the Bankruptcy Act and by Order entered November 6, 1975, of the Bankruptcy Court for the United States District Court, Southern District of New York, was adjudicated bankrupted and ordered liquidated. Thereafter, on November 7, 1975, the Defendant filed "Embargo Notice No. 1" with the Commission placing an embargo against all traffic tendered to Defendant after 12:01, Friday, November 7, 1975.

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3. By virtue of a tariff, ICC 153, Commodity Tariff 85, issued May 16, 1975, and effective June 15, 1975, the Defendant purported to publish rates applicable to a broad range of commodities including acids, adhesives, advertising materials, aluminum and aluminum articles, athletic goods, automobile parts, building materials, chemicals, department store merchandise, drugs, medicines and toilet preparations, electrical appliances and equipment, foodstuffs, canned or prepared, floor coverings, furniture, glass and glassware, inks and dyes, iron and steel articles, paints, stains and varnishes, machines and machinery, paper and paper products, petroleum products, plastic other than expanded and rubber, printed material and textiles and textile products, between various points and places in the United States. Such tariff purported to relate to operations of Rexco, a division of REA Express, Inc., and the mileage rates therein published applied to shipments with minimum weights ranging from 16,000 pounds to 40,000 pounds.

4. Upon information and belief, the Defendant through its Rexco division on or about June 15, 1975, commenced a system of operations in the transportation of property for hire wholly distinguishable and different from the system of operations theretofore conducted by the Defendant under its operating authorities. All of the operating authorities issued by the Commission to the Defendant in Docket No. MC-66562 and related Subs are limited to the transportation of property moving in express service over regular routes, and Complainants aver that the aforesaid operations of the Rexco division of the Defendant are unlawful and in violation of Section 203(c) and Section

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206(a) of the Interstate Commerce Act in that they are not within the scope of the operating authorities held by the Defendant.

5. Upon information and belief, Complainants aver that the Defendant through its Rexco division is performing an irregular route service as defined by the Commission in that said service is on a call and demand basis and principally, if not entirely, involves the movement of truckload traffic from one consignor to one consignee. Upon information and belief, Complainants allege that the operations and service of the Defendant through its Rexco division lack any of the characteristics of the express service that the Defendant is limited to providing in that such operations are conducted over irregular routes rather than regular routes; commodities are not being moved on pre-arranged, firmly established schedules or accorded special expedited service; the Defendant is not charging premium rates; and Defendant is not confining such movements to those handled in ordinary van equipment. See, Transportation Activities of Arrowhead Freight Lines, 63 M.C.C. 573 (1955). Such operations are indistinguishable from those of ordinary general commodity motor carriers such as those conducted by Complainants and are unlawful.

6. By reason of the facts alleged in the foregoing paragraphs, the Defendant has been and is now engaging in the transportation of general commodities by motor vehicle, in interstate and foreign commerce, in ordinary freight service, between points in the United States without authority from the Commission in violation of Sections 203(c) and 206(a) of the Act. It appears that the Defendant is rapidly building up the aforesaid unlawful operations, and, upon information and belief,

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it has been represented to the aforesaid Bankruptcy Court that the revenues in December, 1975, from such unlawful operations will approximate $500,000. Such operations are being conducted and expanded within the authorized territories of the Complainants and are now resulting, or will in the near future result, in substantial diversions of traffic from the Complainants and other appropriately certificated common carriers.

WHEREFORE, the Complainants pray that an Order be issued commanding the Defendant to cease and desist from the aforesaid violations of the Interstate Commerce Act, and that such other and further Order or Orders be issued as the Commission may consider proper in the premises.

Complainants contend and believe that the relief sought is not a major federal action significantly affecting the quality of the human environment, within the meaning of the National Environmental Policy Act of 1969.

Respectfully submitted,

ASSOCIATED TRUCK LINES, INC.
ASSOCIATED TRANSPORT, INC.
B & P MOTOR EXPRESS, INC.
EARL C. SMITH, INC.
EASTERN EXPRESS, INC.
GREAT LAKES EXPRESS CO.
HOLLAND MOTOR EXPRESS, INC.
INTERSTATE MOTOR FREIGHT SYSTEM
JONES MOTOR
JONES TRANSFER COMPANY
LONG TRANSPORTATION COMPANY
McLEAN TRUCKING COMPANY
RYDER TRUCK LINES, INC.
STRICKLAND TRANSPORTATION CO., INC.
(Cont'd)

U. S. TRUCK COMPANY, INC.
UNITED TRUCKING SERVICE, INC.

By Rex Eames
Rex Eames
Attorney for Complainants

EAMES, PETRILLO AND WILCOX
900 Guardian Building
Detroit, Michigan 48226
(313) 963-3750

Dated: December 11, 1975

871

Docket MC-C 8874 C.E.2

SERVICE DATE

JAN 5 1976

INTERSTATE COMMERCE COMMISSION

WASHINGTON, D. C.

December 16, 1975

NO. MC-C 8874

ASSOCIATED TRUCK LINES, INC., ET AL

JAN 7 1976

-v-

REA EXPRESS, INC.

NOTICE TO DEFENDANT:

Herewith is a copy of a complaint filed with the Interstate Commerce Commission in the above-entitled proceeding.

Defendant is hereby called upon to satisfy the complaint or to answer the same in writing within twenty days from this service date.

Complainants contend that the relief sought is not a major federal action significantly affecting the quality of the human environment, within the meaning of the National Environmental Policy Act of 1969.

ROBERT L. OSWALD,

Secretary

Copy to:

Associated Truck Lines, Inc.
Vandenberg Center
Grand Rapids, MI. 49502

Rex Eames
900 Guardian Bldg.
Detroit, MI. 48226

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Docket MC-C 8874
C.I.3

BEFORE THE

INTERSTATE COMMERCE COMMISSION

ASSOCIATED TRUCK LINES, INC., ASSOCIATED TRANSPORT, INC., B&P MOTOR EXPRESS, INC., EARL C. SMITH, INC., EASTERN EXPRESS, INC., GREAT LAKES EXPRESS CO., HOLLAND MOTOR EXPRESS, INC., INTERSTATE MOTOR FREIGHT SYSTEM, JONES MOTOR, JONES TRANSFER COMPANY, McLEAN TRUCKING COMPANY, RYDER TRUCK LINES, INC., STRICKLAND TRANSPORTATION CO., INC., U.S. TRUCK COMPANY, INC., and UNITED TRUCKING SERVICE, INC., Complainants,	No. MC-C8874
v.	
REA EXPRESS, INC., Defendant.	ANSWER OF REA EXPRESS, INC. TO THE COMPLAINT OF THE ABOVE NAMED COMPLAINANTS

Respectfully submitted,

WHITMAN & RANSOM
522 Fifth Avenue
New York, NY 10036
and
MARCUS & ANGEL
60 East 56th Street
New York, NY 10022

Co-Counsel to the Trustee

WISEHART & KOCH
219 East 42nd Street
New York, NY 10017
and
DONELAN, CLEARY & CALDWELL
Washington Building
15th Street & NY Avenue, NW
Washington, DC 20005

Special Counsel to the Trustee

Of Counsel

Donald L. Wallace
Frank M. Buscaglia
John M. Cleary

Dated: Washington, DC
January 26, 1976

873

BEFORE THE

INTERSTATE COMMERCE COMMISSION

ASSOCIATED TRUCK LINES, INC., ASSOCIATED TRANSPORT, INC., B&P MOTOR EXPRESS, INC., EARL C. SMITH, INC., EASTERN EXPRESS, INC., GREAT LAKES EXPRESS CO., HOLLAND MOTOR EXPRESS, INC., INTERSTATE MOTOR FREIGHT SYSTEM, JONES MOTOR, JONES TRANSFER COMPANY, McLEAN TRUCKING COMPANY, RYDER TRUCK LINES, INC., STRICKLAND TRANSPORTATION CO., INC., U.S. TRUCK COMPANY, INC., and UNITED TRUCKING SERVICE, INC.,	:	No. MC-C8874
Complainants,	:	
v.	:	
REA EXPRESS, INC.,	:	
Defendant.	:	

ANSWER OF REA EXPRESS, INC.
TO THE COMPLAINT OF
THE ABOVE NAMED COMPLAINANTS

Comes now C. Orvis Sowerwine, Trustee in Bankruptcy of REA Express, Inc. (REA or Defendant) by his counsel, and answers the Complaint of the above named Complainants as follows:

I

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 1 of the Complaint.

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II

Defendant admits the allegations set forth in paragraph 2 of the complaint and further responds to such allegations by noting that by Amendment No. 1 to Embargo Notice No. 1 issued November 10, 1975, Defendant qualified its original Embargo Notice to emphasize that such embargo did not affect the operation of the REXCO Division of REA.

III

Defendant responds to the allegations set forth in paragraph 3 of the Complaint by referring to Commodity Tariff 85, I.C.C. 153, which became effective on July 15, 1975.

IV

Defendant denies the allegations set forth in paragraph 4 of the Complaint other than to admit that the REXCO Division has transported and continues to transport shipments in interstate commerce, the first such shipment having taken place on August 15, 1975.

V

Defendant denies the allegations set forth in paragraph 5 of the Complaint other than to admit that the REXCO Division operates pursuant to Certificates of Public Convenience and Necessity issued by the Interstate Commerce Commission to REA.

875

Defendant responds to the allegations set forth in paragraph 6 of the Complaint as follows:

a. Defendant admits that the REXCO Division is transporting shipments in interstate commerce.

b. Defendant admits that by application to the Bankruptcy Court dated December 8, 1975 it stated that it ". . .anticipated that REXCO's gross monthly revenues will substantially increase in the near future and may well exceed $600,000.00 per month in a short time."

Defendant denies all other allegations set forth in paragraph 6 of the Complaint.

WHEREFORE, Defendant prays that the Complaint herein be dismissed.

Dated: Washington, DC
January 26 1976

Respectfully submitted,

WHITMAN & RANSOM
522 Fifth Avenue
New York, NY 10036
and
MARCUS & ANGEL
60 East 56th Street
New York, NY 10022

Co-Counsel to the Trustee

WISEHART & KOCH
219 East 42nd Street
New York, NY 10017
and
DONELAN, CLEARY & CALDWELL
Washington Building
15th Street & NY Avenue, NW
Washington, DC 20005

Of Counsel

Donald L. Wallace
Frank M. Buscaglia
John M. Cleary

Dated: Washington, DC
January 26 1976

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MC-66562
(Sub-No. 2308TA)

SERVICE DATE
JUNE 5, 1968

ORDER

TA-GR-D CI 7(p

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 3rd day of June A. D., 1968.

NO. MC 66562 SUB 2308 TA

APPLICATION OF RAILWAY EXPRESS AGENCY, INCORPORATED, FOR 150 DAY TEMPORARY AUTHORITY TO OPERATE BETWEEN VARIOUS POINTS THROUGHOUT THE UNITED STATES

It appearing, That by application dated April 9, 1968, Railway Express Agency Incorporated (REA) seeks temporary authority for a period of 150 days to restructure its operations throughout served areas in the United States from REA's present service routes basically paralleling rail lines to a so-called Hub system;

It further appearing, That to implement the Hub system, REA proposes to establish 24 Hubs at cities in the United States at which its collection and distribution operations would be centered;

It further appearing, That REA proposes to perform service between the various Hubs over a network of routes to which it refers as the "Primary System, Hub-to-Hub", which routes are both presently authorized and sought herein; and at each of Hub cities REA proposes to perform a so-called "Secondary-System, Hub-to-Satellite", service over a network of routes both presently authorized and sought herein, which routes radiate from the various Hub cities to various points in its present service areas;

It further appearing, That among other factors applicant predicates its request for relief upon the well-known crisis in the movement of small shipments; the circuitous, inefficient and increasing inadequacy of its traditional pattern of a line haul transportation resulting from curtailed rail passenger service, discontinuance of passenger train service and the elimination of mail carrying trains, and the cancellation by certain rail carriers of their joint agreements with REA in connection with the movement of traffic jointly by rail and motor service;

It further appearing, That such cancellations and discontinuance have resulted in REA having to conduct inefficient operations under its present authority, that it has suffered severe financial losses, and that this trend is continuing and is being aggravated by the inefficient manner of operation which REA is forced to conduct under its present authority;

BEST COPY AVAILABLE

It further appearing, That, as indicated in the application, the authority sought will not result in the entry by REA into areas not previously served;

It further appearing, That an emergency situation exists with respect to the continuation of the express operations of REA and, that to enable the provision for express service for which there is an immediate and urgent need to points in areas having no carrier service capable of meeting such need, such emergency requires the authorization of express service to the extent set forth herein;

It further appearing, That because of the physical scope and length of the descriptions of the routes sought herein, it would not be feasible at this time to reproduce all such route descriptions, but that such descriptions as filed shall be attached to the original of this order, and a copy thereof shall be available for inspection by any interested person at the offices of the Commission in Washington, D. C.; and

Wherefore, and good cause appearing therefor:

It is ordered, That applicant be, and is hereby granted temporary authority as a common carrier by motor vehicle, for a period of 90 days commencing no sooner than July 2, 1968, conditioned upon full compliance with all applicable statutory and Commission requirements concerning tariff publications, evidence of security for the protection of the public, and designation of agents upon whom process may be served, to engage in the business of transportation by motor vehicle, in interstate or foreign commerce, of general commodities, moving in express service, from, to, and between the points and areas, and over the routes set forth in the application, subject to the right of applicant to combine the authority it presently holds with the authority granted herein, and to combine the various routes granted herein one to another, at common service points.

By the Commission, Division 1.

(SEAL)

H. NEIL GARSON,
Secretary.

NOTICE TO PARTIES: The General Rules of Practice of the Commission provide that petitions for reconsideration of the action of Division 1 may be filed within thirty days following service of notice of such action and that an original and six copies of such petiton be filed, Petition should contain a statement certifying that one copy has been served on each party of record in this proceeding.

Docket MC-66562 (Sub No. 2345) (Part 181)

C.I. 173

REA EXPRESS
219 EAST 42ND STREET, NEW YORK, N. Y. 10017 • 557-2000

February 11, 1969

Mr. H. Neil Garson
Secretary
Interstate Commerce Commission
Washington, D. C. 20423

Application of Railway Express Agency, Incorporated, MC 66562 Sub 2314 (Hub System), filed May 29, 1968 as clarified and corrected.

Dear Mr. Garson:

In accord with Notice 1238 dated November 15, 1968 of the above application, published in the Federal Register on November 23, 1968, and Section 247(f) of the Commission's Rules of Practice, Railway Express Agency, Incorporated, the applicant in the above proceeding, hereby notifies the Commission that it is ready to proceed and prosecute the above application.

Very truly yours,

John C. Ashton
Vice President &
General Counsel

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Docket No. MC-66562 (Sub 2345) (Part 181)
SERVICE DATE C. I. 180
OCTOBER 30, 1969

ORDER
INTERSTATE COMMERCE COMMISSION

No. MC 66562 (Sub-No. 2314)

RAILWAY EXPRESS AGENCY, INCORPORATED
New York, N. Y.

PRESENT: Rupert L. Murphy, Commissioner, to whom the matter which is the subject of this order has been assigned for action thereon.

It appearing, That the above-entitled proceeding is one which the Commission is authorized by the Interstate Commerce Act to refer to an examiner:

It is ordered, That the above-entitled proceeding be, and it is hereby, referred to Examiners James A. Mc Kiel and Henry C. Winters for hearing on the 12th day of January, 1970, at 9:30 o'clock a.m. United States Standard Time, at the Offices of the Interstate Commerce Commission, Washington, D. C., and for recommendation of an appropriate order thereon, accompanied by the reasons therefor. This assignment is for receipt of applicant's operating evidence only. Times and places for evidence of public witnesses will be scheduled later. At this time additional hearings are contemplated at Washington, D. C.; New York, N. Y.; Atlanta, Ga.; Chicago, Ill.; Kansas City, Mo.; and San Francisco, Calif., for the presentation of evidence of public witnesses in support of the application. At the close of the hearing scheduled herein, the parties should be prepared to discuss future times and places of hearing and applicant should be prepared to indicate the number of public witnesses it expects to present at the various places of hearing and the anticipated time to be required for the presentation of its direct evidence at each place of hearing;

And it is further ordered, That (a) Applicant shall make available at the hearing competent witnesses for examination on all matters or relevant facts recited in the application, and (b) testimony adduced by applicant's company witnesses shall be subject to the following Special Rules of Procedure for Hearing:

(1) All of the testimony to be adduced by applicant's company witnesses shall be in the form of written statements which shall be submitted at the hearing at the time and place indicated.

(2) All of the written statements by applicant's company witnesses shall be offered in evidence at the hearing in the same manner as any other type of evidence. The witnesses submitting the written statements shall be made available at the hearing for cross-examination, if such becomes necessary.

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(3) The written statements by applicant's company witnesses, if received in evidence, will be accepted as exhibits. To the extent the written statements refer to attached documents such as copies of operating authority, etc., they should be referred to in the written statements as numbered appendices thereto.

(4) The admissibility of the evidence contained in the written statements and the appendices thereto will at the time of offer, be subject to the same rules as if the evidence were produced in the usual manner.

(5) Implementing oral evidence to correct errors or to supply inadvertent omissions in the written statements is permissible.

Dated at Washington, D. C., this 29th day of October, 1969.

By the Commission, Commissioner Murphy.

H. Neil Garson

H. NEIL GARSON,
Secretary.

(SEAL)

Docket MC-66562 (Sub 2345) (Part 181)
C.I. 188

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Railway Express Agency, Incorporated New York, New York	No. MC 66562 (Sub-No. 2314)

REPLY OF
RAILWAY EXPRESS AGENCY, INCORPORATED
TO PETITION OF FREDERIC A. BETHKE,
DBA BETHKE TRUCK LINES, AND
REQUEST FOR PREHEARING CONFERENCE

Railway Express Agency, Incorporated (REA), applicant in this proceeding, files this Reply to the petition of Frederic A. Bethke, DBA Bethke Truck Lines, requesting that REA be required to furnish certain information to petitioner. In addition, REA requests that a prehearing conference in this matter be set.

In our view, petitioner's requests that written testimony be supplied at least ten days prior to the hearing and that prospective witnesses be identified at least ten days prior to subsequent hearings are not unreasonable, would assist in expediting the hearings in this matter, and should be applicable to the evidence to be presented by all parties.

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The hearing in this matter promises to involve large numbers of protestants and rather unusual issues. While many procedural matters are covered in the Commission's order served October 30, 1969, others, such as petitioner's request herein, are not. REA believes that a prehearing conference, pursuant to Rule 68 of the Commission's General Rules of Practice, would aid measurably in insuring an expeditious proceeding structured so as to minimize the drain on the resources of the parties and the Commission but at the same time resulting in an adequate record.

REA, therefore, respectfully requests that the Commission direct that such a prehearing conference be held at which all parties should be prepared to discuss the items specified in Rule 68 and to enter into a stipulation with respect to the exchange of testimony and witness lists and like matters. Because the hearing is presently set for January 12, 1970, we suggest that the prehearing conference be held on December 18 or 19, 1969.

CONCLUSION

For the reasons stated above, REA respectfully

requests that the Commission order a prehearing conference in this matter in Washington, D. C. on December 18 or 19, 1969.

Respectfully submitted,

LEIBMAN, WILLIAMS, BENNETT,
BAIRD AND MINOW

By John E. Robson
John E. Robson

By Elroy H. Wolff
Elroy H. Wolff

1156 Fifteenth Street, N. W.
Washington, D. C. 20005

Attorneys for Railway Express
Agency, Incorporated

Of Counsel:

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219 East 42nd Street
New York, New York 10017

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Docket MC-66562 (Sub 2345)
(Part 181)

C.I. 189

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NORMAN L. NELSON, JR.
JACK L. COKE, JR.
LOUISE SNOW PHINNEY

November 28, 1969

Mr. H. Neil Garson
Secretary
Interstate Commerce Commission
Washington, D. C. 20423

Re: Railway Express Agency, Inc.
No. MC 66562 (Sub No. 2314)

Dear Mr. Garson:

I have just received a request on behalf of Railway Express Agency, Inc. for a prehearing conference in Washington on either December 18 or 19, 1969. This firm filed a protest on behalf of Herrin Transportation Company (now merged into McLean Trucking Company) and we are not opposed to a prehearing conference if the Commission feels it is necessary, but we are violently opposed to having a prehearing conference the week of December 18, 1969.

As you may know, there are numerous setting already scheduled for that week and this firm has commitments for the Commission on both the 18th and 19th of December. If it is necessary to have a prehearing conference prior to the time the application is heard, I suggest that as an alternative the prehearing conference be scheduled in January, 1970, and the hearing be held at a later date.

Very truly yours,

Phinney, Hallman, Pulley & Livingstone

By Wm. E. Livingstone III
Wm. E. Livingstone, III

Attorneys for McLean Trucking Company

WEL:pw

cc: All parties of record

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Docket MC-66562 (Sub 2345) (Part 181)

INTERSTATE COMMERCE COMMISSION
Washington, D. C.

SERVICE DATE
DECEMBER 10, 1969

C.I. 191

No. MC 66562 (Sub-No. 2314)

BEST COPY AVAILABLE

RAILWAY EXPRESS AGENCY, INCORPORATED
New York, N. Y.

December 4, 1969

NOTICE TO THE PARTIES:

Hearing in the above-entitled proceeding, now assigned January 12, 1970, at Washington, D. C., before Examiners James A. McKiel and Henry C. Winters, is canceled.

In accordance with Rule 68 of the Commission's General Rules of Practice, notice is hereby given to all parties interested, that a pre-hearing conference in the above-entitled proceeding will be held on January 12, 1970, at 9:30 o'clock a.m. United States Standard Time, at the Offices if the Interstate Commerce Commission, Washington, D. C., with Examiners James A. McKiel and James C. Cheseldine presiding.[1]

At the pre-hearing conference it is contemplates that the following matters will be discussed:

(1) The issues generally with a view to their simplification;

(2) The possibility and desirability of agreeing upon special procedure to expedite and control the handling of the proceeding including the submission of all or any portion of the testimony to be adduced by written statements;

(3) The time and place or places of such hearing or hearings as may be agreed upon;

(4) The number of witnesses to be presented at the time required for such presentations by all the parties;

(5) The practicability of submitting in written form the direct testimony of all parties with respect to the issues raised by the Order of the Commission, herein, dated October 29, 1969.

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[1] Note: Protestants who find it impossible to attend the pre-hearing conference may, if they so desire, file written representations on the issues referred to above by submitting two copies with the Commission and one copy to applicant's counsel (John E. Robson and Elroy H. Hulse, Latham, Williams, Bennett, Baird and Minow, 1000 Fifteenth Street, N. W., Washington, D. C. 20005) on or before January 5, 1970. Such statements, as a matter of record, should state their positi

(5) The practicability and desirability of all parties exchanging exhibits covering the immediately above-listed matters in advance of any hearing; and

(7) Any other matters by which the hearing can be expedited or simplified or the Commission's handling thereof aided.

H. NEIL GARSON,
Secretary.

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Mr. Hernly: Harold G. Hernly, 711 Fourteenth Street, N. W., Washington, D. C., 20005. I appear here on behalf of Boss Linco Lines, Inc., Buffalo, New York; Houff Transfer, Inc., Weyers Cave, Virginia; Baggett Transportation Co., Hamilton, Alabama, and Gordons Transports, Inc., Memphis, Tennessee.

Exam. McKiel: Any others?

I assume all of you have entered appearances and filled our your appearance blanks? If not, you should do so.

All right.

The notice of December 4 listed several matters for discussion at this conference, the first being an issue generally with a view toward their simplification. I think we might ask counsel for Railway Express if they have any suggestions in that respect?

Mr. Coker: I would like to renew a petition for leave to intervene. I have a written copy.

Exam. Cheseldine: Let the record show the Commission acted on that favorably last Friday, the ninth of January.

Exam. McKiel: All right.

Are we ready?

I asked applicant's counsel if they could comment on the first matter listed in the notice, namely, issue generally with a view toward their simplification.

Mr. Wolff: Mr. Examiner, RAA would, of course, be very pleased if this conference does result in some narrowing of the

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issues. We have no specific suggestion to make. It seems to us that probably if there are any difficulties in narrowing the issues it won't come from our side of the case.

Exam. Cheseldine: Where we can start from?

Mr. Wolff: I beg your pardon?

Exam. Cheseldine: What do you understand the issues to be? Maybe we can start from there?

Mr. Wolff: Certainly this case is distinct from the routine motor operating rights case. This is a case that first of all involves nationwide service, and a nationwide service that is already in existence and has been in existence for many years.

I think that the routine matters which are approved in ordinary motor rates cases are really not in issue here.

One of the issues in this case, perhaps, is whether the proposed service would result in any service to new areas or new points.

Another issue is whether it is necessary for REA Express to obtain the authority sought in order to replace discontinued and inadequate passenger train service.

We think those are the two primary issues in the proceeding, Mr. Examiner.

Exam. Cheseldine: Well, Mr. Wolff, maybe we can get at it this way: Will you let the Commission know how you intend to prove your case?

Mr. Wolff: We intend to prove that there is no new service involved in this application, by testimony. We intend to prove by testimony of company employees, officers and expert witnesses, that the authority sought is imperative if PEA is to continue to exist. And further underlying that, that the discontinuance of passenger train service and detioration of whatever passenger train service remains has left PEA with no alternative but to seek these rights in order to continue its service, not to provide any new service.

Exam. Cheseldine: Am I to understand from that statement that you are not going to provide and furnish testimony of any public witnesses in this proceeding?

Mr. Wolff: No, Mr. Examiner.

Exam. Cheseldine: Well, that was your inference from your statement.

Mr. Wolff: I beg your pardon if I mislead you then. PEA will present shippers who presently use REA service and have used REA service for many years, who will testify to the effect that it is necessary that service be maintained.

Exam. Cheseldine: Well, that comes to the question of how many are you going to present?

Mr. Wolff: There were more than 300 certificates of support filed with the application. We would hope that we would not need to take up the time of the parties and the Commission with 300 witnesses.

I think at some point we should be able to obtain a stipulation from the parties that testimony of remaining witnesses would be to the same effect as that already presented, or the Examiner might perhaps even rule that there is no need for us to introduce additional testimony.

To give you an outside figure, I would expect that with no more than one hundred shipper witnesses, we can prove that those presently using REA service still need REA service.

Exam. Cheseldine: Well, what is going to be the scope of the evidence by the employees or officials of REA in support of their position?

Mr. Wolff: We will present --

Exam. Cheseldine: I am not asking for generally, and that is what we are trying to get. You can't just start out here by saying that it is up to the protestants to tell us what they think the issues are. You have got to say what you think the issues are first.

Mr. Wolff: Yes, Mr. Examiner, I think I have. The scope of the --

Exam. Cheseldine: Well, then, am I to understand that you do not consider this application that you are required to prove public convenience and necessity?

Mr. Wolff: No, sir, I left that phase out, but of course we must prove what is necessary in order to comply with the statutory provisions.

Exam. Cheseldine: All right, then, what do you think that

will require in this particular proceeding?

Mr. Wolff: I think I had set that forth. I will repeat it, then. I think --

Exam. Cheseldine: I wish you would, because I want to get it definitely straight, just on what basis you intend to present this application evidence?

Mr. Wolff: Is the authority sought going to result in a new service to new areas or new points? Is it necessary for REA Express to obtain authority of the type sought, in order to continue to provide service which it has provided in the past?

And, third, with the use of the shipper testimony we discussed, is there a shipper need for the continuance of the service of REA, the service that REA has provided for many years. All of that, I think, will add up to the public convenience and necessity standard of the statute.

Exam. Cheseldine: Well, REA holds a considerable amount of present authority. I think that goes without saying. Since you say that there is going to be no change, why did you file this application?

Mr. Wolff: We filed the application, Mr. Examiner, as I indicated, because REA, prior to April of 1968, struggled along with an antiquated and inadequate operating system, which was tied to rail passenger trains. As the Examiner is well aware and as everyone else in this room, for all

practical purposes, their aren't any more rail passenger trains, and it became impossible to provide express service, good service, at reasonable rates, because of the disappearance of the underlying motor transportation previously used by REA. Although REA did hold a considerable amount of motor operating authority from the Commission, going back more than thirty years, it was insufficient to continue to conduct the very same operations REA had conducted for many years, because it was fragmented, it was subject to requirements of the circuitious routings, and various kinds of inefficiencies, which we will present in evidence in great detail in this proceeding.

And so with the disappearance of the passenger trains, REA was forced to seek motor operating authority, to permit it to maintain its existing service.

Exam. Cheseldine: Mr. Wolff, it is necessary to get this on the record. There is a lot of things that are known to the Examiner, known to these gentlemen, but I have to get it on the record, so we know where we are starting from.

Mr. Wolff: Yes, sir, I appreciate that.

Exam. Cheseldine: I think that, as a practical person, realize that your emphasis here is on the continuation of the same?

Mr. Wolff: Yes, Your Honor.

Exam. Cheseldine: Well, the continuation of the same, in your mind, may be different from other people's, and it

is obvious that if it is merely a continuation of the same you won't need any additional authority. So, maybe we are coming to the proposition that the issue here, first, is whether you need to file this application at all, or whether you can continue to operate as you propose to do under your present authority. Is that the first issue?

Mr. Wolff: Well, I don't accept the Examiner's statement, respectfully, Mr. Examiner, that we didn't need the authority in order to maintain the same service.

Sir, that,respectfully, is not correct.

Exam. Cheseldine: Well, if it is not correct, then how do you say that you are merely seeking authority to continue what you have always done?

Mr. Wolff: I explained that REA, in order to continue to serve the same points and areas of the country it had previously served, as an express company, under part one of the Act, using railroads, railway passenger trains, was required, because of the disappearance of those passenger trains, to seek the authority sought in this application, and that is in order to maintain exactly the same service.

Exam. Cheseldine: Well, how is it the exact same service?

Mr. Wolff: It's express service, from and to the same points served, again, for many, many years, for decades.

Exam. McKiel: Is the interpretation based on discontinuance of rail service?

Mr. Wolff: It's in the sense, Mr. Examiner, that REA provides a nationwide system of service, and in order to operate as a system, it is necessary to have a broad fabric of operating rights, motor operating rights, to permit REA to operate effeciently and economically. Whatever motor operating rights REA had before -- and I should add that a very large percentage of this application consists of permanent motor operating authority that REA had previously held.

There is nothing new about that at all. It's a very substantial percentage of the application. For the convenience of the Commission, it was all wrapped up in one place in this application. Existing authority that was to be used as part of the hub system was set forth in the application, and of course as to that there can be no issue whatever.

REA holds that authority. It's not really in issue in this proceeding.

Exam. Cheseldine: What is that?

Mr. Wolff: There are a certain amount of the routes set forth in this application consisting of authority presently -- that is, at the time the application -- held by REA Express.

Exam. Cheseldine: Unrestricted?

Mr. Wolff: Some of it does contain restrictions, Mr. Examiner. Yes.

Exam. Cheseldine: Let's use an analogy. Maybe you won't consider it one. But are you acquainted with the fact that

the railroads in the midwest had considerable substituted rail authority to handle LCL traffic in the substituted service by motor carrier?

Mr. Wolff: I have no knowledge of that but I would accept the Examiner's statement.

Exam. Cheseldine: Well, if you have no knowledge of it, I can't use the following, when the substituted areas sought to get authority from the Commission to handle traffic not related to rail movements, it came back with another application for unrestricted authority. But if you have no knowledge of it, I can't use it as an analogy.

What do you consider service to be?

Mr. Wolff: Express service, Mr. Examiner.

Exam. Cheseldine: Well, I wasn't getting into the different kinds of service. I was just talking about service, by a transportation company, rail or motor carrier. We'll get to the basics of it.

Mr. Wolff: The movement, in our case, of express shipments tendered for transportation. That is -- and the attendant service which goes along with that.

Exam. Cheseldine: Now, does the authority held by a carrier have anything to do with the type of service he performs, it performs?

Mr. Wolff: Sometimes it does.

Exam. Cheseldine: Does it have any effect in connection

with REA?

Mr. Wolff: Yes, I think it does, Mr. Examiner.

We are authorized to operate as an express company. And the application in this proceeding seeks authority, in the transportation of commodities generally moving in express service.

Exam. Cheseldine: What do you consider an express service to mean?

Mr. Wolff: Mr. Examiner, I am not prepared to define express service here this morning. The Commission has discussed that issue many times in quite a number of cases, most recently I think discussed at length in the ex parte 242 Terminal Area proceeding. I don't think we are prepared to discuss the issue this morning.

I am not sure how it helps us in this proceeding.

Exam. Cheseldine: Well, I am a little at a loss, Mr. Wolff, with you saying that you are going to provide exactly the same service, but yet, it is going to be different and you need different authority. That is what I can't understand.

Mr. Wolff: Sir, I have -- we are going to serve the same areas and the same points. We are going to provide express service. The vehicles used are going to be different. We are going to use motor trucks, instead of express cars attached to passenger trains. That is the difference.

Exam. Cheseldine: Well, that is the first time you have said so. That is what I have been trying to get to, to have on the record.

Mr. Wolff: There it is.

Exam. Cheseldine: All right.

Now, is this an application under Part 2 of the Act or Part 1?

Mr. Wolff: REA is an express company regulated by the Commission, pursuant to Part 1 of the Interstate Commerce Act. The determination of status case, 1937, provided that REA, when it sought authority to operate motor vehicles, line haul transportation, should provide according to the Commission's regulations under Part 2 of the Act.

If you are asking if REA is a motor carrier under Part 2 of the Act, the answer is no, Mr. Examiner, it is not. It's an express company under Part 1 of the Act.

Exam. Cheseldine: Even if you are going to use all motor carrier service?

Mr. Wolff: Yes, sir.

Exam. Cheseldine: Now, will you tell us exactly what the hub points are going to be in this?

Mr. Wolff: Mr. Examiner, they are set forth in the application, which is a document of --

Exam. Cheseldine: Well --

Mr. Wolff: -- substantial size. It's a matter of public

record, I would rather not read it all into the record.

Exam. Cheseldine: No, I will help you, Mr. Wolff, if that is necessary. I just want -- I have looked over the map and the hub points I was not sure of because they crossed and I wasn't exactly sure. Do you know them, in case I ask you about a few?

Mr. Wolff: Perhaps. Perhaps not.

Exam. Cheseldine: All right. It would seem to be clear that Boston, New Haven, New York, Albany, Buffalo, Philadelphia, Pittsburgh, Washington, D. C., Cleveland, with hub points. Am I correct as far as I have gone?

Mr. Wolff: I think that is correct, Mr. Examiner.

Exam. Cheseldine: Well, is Columbus a hub point? I couldn't tell?

Mr. Wolff: No, sir, it is not.

Exam. Cheseldine: Thank you. Cincinnati appeared to be.

Mr. Wolff: Yes, sir, it's designated as Hub 14.

Exam. Cheseldine: All right.

Toledo?

Mr. Wolff: No, Mr. Examiner, Toledo is not.

Exam. Cheseldine: How about Indianapolis?

Mr. Wolff: No, sir, it's not.

Exam. Cheseldine: Detroit, Chicago, Milwaukee, St. Louis, Kansas City, Minneapolis, and Dallas. Minneapolis is not? You have got a routing going up there.

Mr. Wolff: I don't believe Minneapolis is designated as a hub. St. Paul is.

Exam. Cheseldine: Well, St. Paul, all right. Now, the ones I have named, and you have agreed with, are connected by a series of routes, and it is my understanding that you are seeking all motor carrier authority between those points, that is the right to transport express traffic in motor vehicles between those points, is that correct?

Mr. Wolff: Between all the points you mentioned, Mr. Examiner?

Exam. Cheseldine: Yes.

Mr. Wolff: I would have to consult the applicants to be sure that that is correct.

Exam. Cheseldine: The other routes that are separated are between Atlanta and Jacksonville, and between San Francisco and Los Angeles. These routes between those two. And then there is two hubs that are off by themselves, Denver and Seattle, is that correct?

Mr. Wolff: Denver and Seattle are hubs. I am not sure what you mean by off by themselves.

Exam. Cheseldine: Well, they are not connected by any highway routes.

Mr. Wolff: I think that is correct, they are not.

Exam. Cheseldine: Are you in a position to describe generally how you intend to operate this hub system?

Mr. Wolff: Not at a pre-hearing conference, Mr. Examiner. We will certainly present the evidence of company witnesses as to how this system will be operated at a hearing. I am not an operating official of the REA Express and I am afraid --

Exam. Cheseldine: Don't you know what the proposal is?

Mr. Wolff: Yes, Mr. Examiner, I do know what the proposal is but I am not prepared to present in detail how --

Exam. Cheseldine: I didn't ask you in detail. I asked you generally. I was very specific in saying generally.

Mr. Wolff: Would you please repeat the question? So I am sure I know what you are asking, sir?

Exam. Cheseldine: I asked you, could you describe generally how you propose to operate this hub system?

Mr. Wolff: Yes. The express traffic will be checked at the various hub points, for movement to other hubs. At those other hubs it will be distributed throughout the so-called secondary route system, to ultimate destination points. The basic concept -- we will be able to operate between important traffic centers, which are also, as you can see, the large metropolitan centers of the United States. And the general method of operation is to use the hubs as the name implies, as central collecting and distributing points to move traffic out to the smaller communities surrounding these big, urban centers.

Exam. Cheseldine: Well, how will the traffic move from St. Louis to Denver?

Mr. Wolff: Mr. Examiner, I do not know how traffic will be handled between Denver and St. Louis. It may --

Exam. Cheseldine: I will give you the purpose of my question. Denver is one of these hub points, out by itself, not connected by highway route, and I just wonder, I don't care where it's from in the midwest, but I just want to know how it will move to a hub that does not have a route.

Mr. Wolff: How express company traffic would move?

Exam. Cheseldine: That is all we are talking about.

Mr. Wolff: It would move by rail, Mr. Examiner.

Exam. Cheseldine: The same thing would be to Seattle, is that it, to and from Seattle would be by rail?

Mr. Wolff: I believe that is correct.

Exam. Cheseldine: Is that rail passenger service or is that going to be freight trains?

Mr. Wolff: It would not be a freight train, it might be piggy back service, and if there are rail passenger trains still being operated between those points, which is probably not the case, but it's possible --

Exam. Cheseldine: Isn't it true, Mr. Wolff, you just don't know?

Mr. Wolff: I don't know what, Mr. Examiner?

Exam. Cheseldine: Well, you are talking probably, probably.

Mr. Wolff: I do not know, with any certainty, how REA Express operates over any portion of its system, Mr. Examiner.

We will certainly satisfy you on all those questions at the hearing, and in as much detail as you desire.

Exam. Cheseldine: Well, I wasn't interested in too much detail this morning, but I thought we would at least get a general picture of the proposal.

Mr. Wolff: Well, if there is something in general that you don't understand about the proposal --

Exam. Cheseldine: I just asked a few questions and you came back with probably, probably, and that is not binding on you, or anybody else.

Mr. Wolff: To the extent that motor operating rights are not sought between points, and are not presently held by REA, the traffic, then, is moving by rail. It may move by rail passenger train, if such service exists, it may move in piggy back service. I suppose there is a possibility that it could move on mail and express trains, but very few of those are left. And so I have to say possibly, because I am not fully familiar with every, or any, for that matter, existing mail and express train.

Exam. Cheseldine: Do you have any more comments to make about Part 1 of the prehearing conference order?

Mr. Wolff: I do not, Mr. Examiner. If my co-counsel do --

Mr. Robson: I have none, Mr. Examiner.

Mr. Wisehart: No.

Exam. Cheseldine: How about the other paragraphs? Do

you want to make a statement in respect to those?

Mr. Wolff: Well, whichever way the Examiner prefers to cover the issues. If you would like us to cover each one first, and then the protestants, I will do that.

With respect to Item 2, REA requests that all parties agree that all testimony and exhibits to be introduced in the proceeding be prepared in writing and served in advance upon all parties. We would suggest at least ten days in advance of the day on which the witness is to testify. Naturally, each party would have a right to correct or modify written testimony orally, and each party would have the right to cross-examine each witness. This is, I believe, pretty much the procedure which was set up in the original order issued by Commissioner Murphy.

And the same item, in Item 2, we would like to say that service list in this proceeding is extremely long. It has perhaps almost 200 hundred names on it, and service of evidence and exhibits on every person on that list is going to be extremely expensive and unduly burdensome, not simply for the applicant, but for all the other parties in the proceeding, and I have a feeling that quite a number of names on that list are no longer interested in the proceeding, and we request, therefore, Mr. Examiner, that a new service list be prepared, containing the names only of those parties who have appeared of record today, at this proceeding, or have filed written

representations with the Examiner with respect to the prehearing conference. Other parties who may want to be served could write to the Secretary of the Commission and ask to be put back on the list.

But I can't tell you how expensive and time-consuming it is to have to serve 200 persons each time.

In the same connection, there are obviously going to be a great many protestants participating in this case, and in the interest of an orderly and reasonably expeditious proceeding, REA requests that the protestants agree upon a spokesman or perhaps two or three spokesmen to conduct cross-examination. We are going to have a very protracted hearing if everyone sitting in the hearing wants to get up and cross examine every witness, and I think we could save a lot of time if the leading counsel for the protestants would undertake to agree with their fellows on who should conduct the cross-examination.

Item 3, time and place of hearings. As I stated earlier, this proceeding deals with a nationwide system, and it's really not possible to bring the proceeding to all parts of the country, which are going to be involved. REA's counsel is located in Washington, Mr. Robson and I have our office here in Washington, and counsel for the leading protestants, I gather this morning, are also located in Washington.

REA will request to put on its case solely in Washington.

We will undertake to bring our own witnesses to Washington, if they are located in other parts of the country. I think this will be much more convenient for everybody concerned, than to move the proceeding from city to city all around the country. And a quick examination only of the statements filed with the Commission with respect to the prehearing conference, and there weren't very many, indicates that the following cities have been suggested as possible places for hearing:

Denver, Charlotte, Raleigh, North Carolina, Chicago, San Francisco, Los Angeles, Phoenix, Minneapolis, Kansas City, Little Rock, Shreveport, Dallas, Detroit, Lincoln, Omaha, and there was some others in the protests that were filed.

Obviously the expense for all concerned to travel around the countryside during the course of what promises to be a rather long hearing, seems to me is going to be an unbearable burden for REA Express to bear, so in summary, we ask that our direct case be put on entirely in Washington.

Exam. McKiel: You are including shippers, too?

Mr. Wolff: Yes, Your Honor. With respect to where the protestants put their case on, I think perhaps it is premature at this point to make a firm determination of that. It may be that the applicant will have little or no cross-examination of some protestants, and protestants' witnesses, and as a result it may not be necessary to go to those locales at all.

As to Item 4, I have this morning mentioned REA's plans with respect to the number of witnesses. I will repeat that. We expect to present 8 to 10 company employees, officers or consultants, as witnesses. We also plan to present testimony of shipper witnesses. I would hope that that could be limited in number, and presently I feel that that number would not exceed 100.

With respect to the time, that would be consumed by this testimony, it is impossible for us today to make any estimate of that, in that the testimony would be written and served in advance, and the witnesses' direct testimony on the stand, will, of course, take very little time. The bulk of the time will be absorbed by cross-examination which we have no way of estimating.

Matter number 5, for practicality of submitting written-form testimony, I think we have dealt with.

Item 6, exchange of exhibits, I think we have dealt with.

With respect to Item 7, any other matters, I have one suggestion to make, one request to make, and that is that all parties agree that the Trinc's statistical publications be agreed upon as sources for use in this proceeding. They are widely recognized as accurate and used by the protestants and other parties in proceedings before this Commission.

I refer to the Trinc's Red and Blue Books of the trucking industry.

At this time, those are the only comments we have with respect to the matters noted in the Commission's order, Mr. Examiner.

Exam. McKiel: Do any of the intervenors in support care to give their impressions, of any of these matters?

Mr. Donelan: I have nothing to say at this time, Mr. Examiner.

Mr. Martin: Mr. Examiner, on behalf of my people, we just feel that the express company is not providing the service that we are now using, and we just don't see that there is any -- we wonder what all the shouting is about, they are already doing it and we don't see the reason for shouting. That is it.

Exam. Cheseldine: Why don't you try to convince Railway Express to withdraw the application?

Mr. Martin: Well, sir, the application is already underway. It's not my position to do that. I think if the shippers -- we are the people using the service, and we are the people who want to continue.

Exam. Cheseldine: I understand your position.

Mr. Martin: Thank you.

Exam. Cheseldine: I am probably being a little facetious.

Exam. McKiel: Anyone else?

Mr. Coker: A Washington, D. C. hearing for public witnesses would satisfy our interests, as far as time or whatever time

is specified. I make no comment on the issues at this time.

Exam. McKiel: Do we have any problem with respect to underlying documents? Are we going to have abstracts involving underlying documents which will need to be examined?

Mr. Wolff: Is the Examiner referring to availability of work papers?

Exam. McKiel: Are you going to use any abstracts of shipments which will involve underlying documents which will need to be examined by the other parties? That is a pretty time-consuming process.

Mr. Wolff: To the extent that there are work papers or underlying documents used in the proceeding, Mr. Examiner, we will make them available in the hearing room. We can make them available at some reasonable time prior to the hearing in our offices here in Washington.

Exam. McKiel: I was wondering if you were going to rely on that type of evidence so it will be a significant factor, we will need to satisfy if we can work out some schedule of those things prior to the hearings.

Mr. Wolff: I don't believe it will be a significant factor, but if it turns out that there will be a large volume of underlying documents, we will be glad to work out a schedule to accommodate the parties in examining the documents, and I might say that that, I suppose, would be a two-way street, we would have access as well to protestants' underlying documents.

Exam. McKiel: We ask the protestants for any suggestions on any of these matters?

Mr. Sigmon: If I may, Mr. Examiner, my name is Richard Sigmon. A number of the counsel for protestants, probably a majority of them who are in the room today, met yesterday and discussed the matters set forth in the Commission's order, and I got pushed up to speak on behalf of those who had agreed at that meeting, but recognizing that there are other counsel who were either not there or who had some reservations with respect to the Item 1, the issues, it's the view of those counsel for protestants who discussed this, that this is an application for motor carrier authority under Part 2 of the Act.

It's a public convenience and necessity case. And the usual public convenience and necessity issues, we think, are issues here. It's a large case, probably unprecedented in its size, and this creates some problem simply in getting a clear understanding of what authority is involved, and also, it appears that, as Mr. Wolff indicated today, and also as has been indicated in the Federal Register summary of the application, that the application does embrace some motor carrier authority which Railway Express already holds, including, as indicated in the Federal Register, some authority which is now held with certain restrictions on it, and there is an intention here to remove restrictions.

I also understand, and I think Mr. Jackson may want to speak to this, there is also some duplication between this application and other presently pending applications of Railway Express.

Mr. Robson: Mr. Examiner, may I interject, excuse me, Mr. Sigmon.

I think it's worth clarifying for whom Mr. Sigmon is speaking. Is this --

Mr. Sigmon: I am speaking on behalf of those parties for whom I entered an appearance, regular common carriers conference of American Trucking Association, as individual carriers, and I am also acting as the spokesman for a number of the protestants' counsel who are in the room today, and who I hope this will avoid their having to repeat this statement.

Mr. Robson: Is there an indication of those whom you are speaking for?

Mr. Sigmon: May we say if you make any statement any of the parties are not in agreement with, they can so indicate.

However you wish to do it, those counsel who were at the meeting yesterday, who generally agreed with the position which I am trying to present today, Messrs. Lakusta, Axelrod, Kinker, Block, Schwartz, Hall, Henderson, Bernhard, McPherson, Murrett, Gonzalez and Jackson.

I do have to make a caveat about Mr. Jackson, because his

carrier does conduct a different type of operation, that Mr. Jackson, I think, would probably want to speak for his carriers on many of these matters. And Mr. Bradshaw, also.

Mr. Hernly: Add Hernly to the list.

Mr. Pillar: Will you also add Mr. Pillar.

Mr. Sigmon: Mr. Pillar wants to agree to this, too.

Exam. Cheseldine: Anybody else?

Mr. Rose: Add my name to the list.

Mr. Robbins: Please add my name.

Exam. McKiel: All right, I guess that takes care of it.

Mr. Sigmon: We do believe that the usual public convenience and necessity issues are involved in this proceeding, and there is an obligation on the applicant to prove that the public convenience and necessity requires the proposed service.

In addition, we believe that the application and the related temporary authority application do raise a serious question about the financial fitness of the applicant, because as I read those applications and the various documents filed in connection with the temporary authority application, one of the reasons for the filing of certainly the temporary authority -- and I believe also this permanent application -- was what applicant described as a critical financial situation which was getting worse at all times, and they cited a very substantial loss of revenue in the one year that was cited, 1965-66 fiscal year, and indicated that that was, if anything, worsening.

So I do believe that the application and the related temporary authority application raises a question about the financial fitness of the applicant, which is one of those considerations that the Commission must deal with in a PC&N application.

There is also, I believe, a question that should be dealt with in this proceeding, and that is the question of the present ownership and control of Railway Express. In prior cases and other cases involving Railway Express before this Commission, it has been evident and it has been part of the case, in fact, that Railway Express was totally, wholly owned by certain of the nation's railroads.

The present indications are that this ownership position has changed, that the railroads have sold or divested themselves of their stock in Railway Express.

However, those present stockholders do indicate that the railroads did retain or did receive, in partial exchange for their stock, certain options, which would entitle them to acquire stock in the Railway Express Company.

Whether REA is still a rail affiliate is a matter which must be resolved, in a PC&N case, because of the Section 5 policy, limiting rail affiliates to motor service, usable to public advantage in their rail operations, and so I think that that question of the ownership and control of Railway Express is an issue that must be considered and dealt with in this proceeding.

Going now to Item 2 on the order of December 4, the counsel for the protestants are agreeable to the submission of all of the direct evidence in written form. I think there was a mention by Mr. Wolff, but I failed to make a note of it, apparently, that it should be substituted, he thought, ten days in advance.

The protestants don't insist on that. We do think it ought to be distributed at least the evening before the particular witness goes on. But I don't know that there is any sharp objection to making it a week or ten days in advance, providing that does not cause any substantial delay in the proceeding, because one of the things we are concerned about is that this matter move as expeditiously as possible, and we know the Commission feels the same way.

Number 3, the time and place of hearings, during the discussion yesterday, we had referred to the places listed in the Commission's order of October 29. I think six or seven points were listed, and the counsel who met were agreeable to those places.

Mr. Wolff indicated that Railway Express would prefer to have all those REA hearings in Washington. I made an appearance today on behalf of two carriers in place of Mr.Rebman, who can not be here today. Mr. Rebman and possibly other counsel from outside of Washington are concerned about the place of hearing, and also the identification of the shippers who will

testify at particular times and at particular locations.

Many of the protestants are not in a position to have a counsel sit continuously through a long period of hearings, although they would like to participate and participate not only in presenting their own evidence, but also in cross-examining those witnesses who are testifying as to the particular area of their concern, their operating authority.

And Mr. Rebman asked me to suggest to the Commission that consideration be given to devising some way, perhaps, of having shippers who will be talking about traffic in a particular territory, grouped together for a hearing, preferably at some point near or in that territory, so that the carriers who operate there would be able to come in at one time and cross-examine those shippers at once, without having to appear throughout the entire hearing.

Now, I recognize that they are what might be called national shippers who are going to be talking about a number of traffic sources around the country, and the regional interests will just have to fend for themselves on that.

But we do believe that regional hearings with the shippers grouped as much as possible, with their testimony relating to the particular region, would be helpful to many of the protestants and we think possibly expedite the hearing because it would avoid their attending many of the other hearings.

As far as the time of the hearing, we have no specific

suggestion, except our general concern that this matter does move along promptly. Railway Express has been operating for a number of months, or has held temporary authority for a number of months, and we would simply like to see the matter progress as rapidly as it can.

As to the number of witnesses to be presented, it's difficult for the protestants to state accurately at this time, because that will depend, in part, on what is developed in the applicant's direct case.

Certainly each of the protestants that participates will have a minimum of one witness, and depending on what is developed in the direct case, one or possibly two other witnesses in addition. I shouldn't think that more than three would be required, except in very unusual cases.

We talked about written submissions, and the exchange of the exhibits. We said we would like to see them exchanged the evening before. We have no objection to exchanging them earlier, if it doesn't delay things.

Another matter going now to number 7, which we think would probably help to expedite, is if the shippers in their presentations relate their testimony as to use or need to the specific routes as set out in the application, this is a very long, a very complex application, and it is quite difficult for the protestants to wade around through it trying to find out what routes might be utilized on particular shipper's

traffic. It would be, I think, easier and it would expedite things if the shippers could indicate in their statement the route or routes which might be used in transporting the traffic which they are excusing in those statements.

Other than that, one of the matters in my own mind, and I did not talk to counsel about this and they may not necessarily agree with it at all, if any shippers are going to claim an inadequasy of existing service as part of their direct testimony, I think to the extent possible, they should try to give the specifics as to attempts made to use that service, the carriers that they attempted to use, and what were the results of the efforts, so that we won't have a lot of cross-examination on a very general complaint that the existing service is inadequate; rather, we will have specific cross-examination dealing with specific instances of alleged inadequacy.

I think that covers everything that was referred to by the group of counsel who were indicated.

Mr. Bernhard: Berl Bernhard, Consolidated Freightways.

Mr. Examiner, what Mr. Sigmon said is entirely accurate as far as any recollection of yesterday's meeting is said. And I subscribe to it. But one issue that was raised by REA a little bit ago was the question about whether or not protestants were going to agree or should be asked to agree on designation of a few individuals for cross-examination, and I would like to state on behalf of Consolidated Freightways

is entirely unacceptable to us. We operate in 23 of the 24 hub centers that are involved here, as good as Mr. Sigmon is or anybody else that may be representing protestants, they can not know the Consolidated operation well enough to cross-examine, they can not know our certificates or our conditions, or our restrictions, and we would find that entirely unacceptable. I would like to suggest that the question of cross-examination is a matter that should be left to the discretion of the Examiner. If the cross-examination becomes wandering or too long or irrelevant, it can be cut off, but I do not believe that we are prepared to give up our right to cross-examination of these witnesses who will be operating, as I said, in 23 of our 24 communities, under their application.

Mr. Sigmon: Mr. Examiner, I agree with Mr. Bernhard. I should have made the point myself and I did forget it. On the other side of it, I think it would be extremely difficult to ask one or two counsel to be sufficiently knowledgeable about the authority and the operations and the facilities of every one of the protestants to effectively represent their interests.

Now, in the past, I think that the counsel here have worked cooperatively with the Commission and with ETA in these Railway Express cases. Certain counsel have tended to take the lead in cross-examination and have avoided a lot of duplication.

But in doing so, they haven't cut off the right of any individual counsel to stand up and speak, as Mr. BErnhard said, for the particular interests of clients, and I don't think that this has delayed any of these proceedings.

I think it has helped them.

Examiner McKiel: Yes, sir.

Mr. Axelrod: I would subscribe entirely to Mr. Bernhard's position of that, than Mr. Sigmon. I think that those of us who represent other carriers should be allowed to cross-examine, and in the discretion of the Examiner, it can be cut off if it becomes repetitious.

Exam. Cheseldine: Well, that is not going to be decided here today, gentlemen, but I can assure you Mr. McKiel will take care of it.

Mr. Axelrod: Yes.

Exam. McKiel: In your suggestion that shippers be grouped in certain areas for hearing, do I interpret from that that you are disagreeing with Mr. Wolff's suggestion that all of his case be heard in Washington?

Mr. Sigmon: I have been asked to state this position, Mr. Examiner, for the two carriers that Mr. Rebman will be representing in the hearing, but he asked me to appear for him today. That is, carriers operating in the midwest, and they are, of course, primarily concerned about the shippers who will be testifying about traffic moving in that area and to the extent possible, if the shippers in that area, or

whose traffic is in that area, could be grouped, then it would mean their counsel could come in for a portion of the hearing only, and not be required to sit through the entire hearing.

Exam. Cheseldine: Mr. Sigmon, and Mr. Wolff, too, that could be taken care of, perhaps if I can ask a few questions.

Mr. Wolff, how soon will you be prepared to present applicant's operating testimony?

Mr. Wolff: We would be prepared to go ahead pretty quickly, Mr. Examiner. I think a good date to begin the hearings would be about, I would suggest March 30 would be a good date.

Exam. Cheseldine: Well, now, that means that you will agree to prepare the operating testimony in its entirety. Does that mean you will also have the shipper witnesses' testimony prepared by them?

Mr. Wolff: We would begin to present our evidence on that day, which is going to take some time to put in all together and we would serve as much of the prepared evidence in advance of that date as we could, and the remainder in advance of the days on which each witness is to testify, continuing the hearings from day to day.

Exam. Cheseldine: Well, what happens to the time you estimate you are going to need for the operating testimony?

Mr. Wolff: As I said earlier, Mr. Examiner, we would have approximately eight to ten witnesses on the various operating testimony questions, and the length of time they will

be on the stand is going to turn on the amount of cross-examination, and that I can't estimate.

Exam. Cheseldine: Well, you can't estimate that, but yet, you are willing to put the evidence of your public witnesses to the protestants, ten days in advance of their appearance.

Mr. Wolff: Well, as the hearings progress --

Exam. Cheseldine: I am not trying to talk about trying to do it. I am trying to get an agreement to do something definitely. That is the point, Mr. Wolff.

Mr. Wolff: And was the proposition to which you want agreement --

Exam. Cheseldine: What I had in mind was whether I can find out from you approximately, within a matter of a week or ten days or two weeks, or even a month, when you can have the written testimony of the public witnesses you are going to submit in this proceeding available.

Mr. Wolff: We would be prepared to begin presenting the shipper testimony by the first of May, Mr. Examiner.

Exam. Cheseldine: What I had in mind, Mr. Wolff, was very simple, which is to set the first phase of this application for hearing on the operating testimony, and at the conclusion or during the course of that hearing, you would present the written statements of all your public witnesses, and provide protestants with copies and before that initial hearing is finished, the Examiner could tell you where he wants to hear

these particular witnesses. I am just trying to get a simple proposition. It would take care of this other problem, if it is a localized, if it is a nation-wide shipper, it could be heard here, if it is a local shipper, why, then, he could be put in a pile to be heard some other point.

Mr. Wolff: I understand.

Exam. Cheseldine: That is all I am getting at, if I can get some definite day as to when you will be ready to go and whenever we can have this thing.

Mr. Wolff: If we want to put all the shipper testimony in writing, at the same time, -- that is, not serve it on protestants seriatim as the witnesses come up for testimony, we would need a little more time to put all that together.

So I would say sometime, the third week in May. We would need six weeks to put all the shipper testimony together, six weeks, I think, from the day we begin with the operating testimony.

Exam. Cheseldine: You are going an awful short time on that, from my experience.

Mr. Robson: He means six weeks from the operating testimony.

Exam. Cheseldine: Oh. That is something else. We haven't figured a date on that yet.

Mr. Wolff: Right.

Mr. Robson: There is a lot of people involved, Mr. Examiner.

Exam. Cheseldine: Well, I would like to set this hearing here in Washington for the operating testimony, and require that the applicant bring the statements in and distribute them to protestants and also mail them to them, and then they can request where they would like them to be heard and you can request where you would like them to be heard, and the Examiner can make a decision.

It seems to me to be fair to all parties, because somebody has got to make a decision. If you have any other suggestions, let me know.

Mr. Sigmon: I am not sure that this might simply delay things, rather than help to expedite them, but I wonder if it's possible to the extent that the shipper statements are completed and ready for distribution, that the identification fo the shipper and his area of use might be furnished, and on that basis, then, the choice might be made.

Mr. Wolff: I think that is a good suggestion, Mr. Examiner, one that we could --

Exam. Cheseldine: If you are willing to try it, I am.

Mr. Robson: We could indicate who the witnesses would be at that point, and where their principal location was.

Mr. Block: Location is irrelevant. It's where the shippers move that is relevant.

Mr. Wolff: I can tell you right now most of them are going to be nationwide.

Mr. Block: That may be and I would be surprised if the majority of them weren't nationwide, in which event they would be here, but there may be a number that would be of local nature.

Mr. Wolff: I think that is a good suggestion, Mr. Examiner, we will do that and give you a date.

Exam. Cheseldine: Is there any reason why you won't have the shippers identified by the time of the March hearing for operating testimony only?

Mr. Wolff: No.

Mr. Robson: We hope there isn't any reason why. We will try to do that.

Mr. Wolff: We will do that, Mr. Examiner.

Exam. Cheseldine: All right.

Now, can you, at the conclusion of the operating testimony, by some exhibit or something, list the shippers that are going to testify in support, and if you don't have their complete testimony, that you will apprise me of the scope of the testimony?

Mr. Wolff: Yes, with respect to the areas involved.

Exam. Cheseldine: Traffic involved, also.

Mr. Wolff: Yes, Mr. Examiner, we can undertake to do that.

Exam. Cheseldine: All right. That is about the best I can think of.

Mr. Sigmon: That is fine.

Mr. Jackson: This is, as I understand it, an application under Part 2. Am I correct in understanding that the rules enunciated in the Schaeffer Case will be applicable to this proceeding?

Exam. Cheseldine: Should be.

Mr. Jackson: Unless Mr. Wolff wants to take another position. Are you acquainted with the Schaeffer Case, Mr. Wolff?

Mr. Wolff: No, I am not, Mr. Examiner. Would counsel describe the rules that he refers to?

Exam. Cheseldine: Well, you have already put your certifications in. I assume that they are going to be the same ones?

Mr. Wolff: The witnesses?

Exam. Cheseldine: Yes, they will come from that group?

Mr. Wolff: Yes, sir.

Exam. Cheseldine: Are you going to have any new ones?

The point is, if you are going to have any new ones, you must notify the Commission and the parties, as soon as reasonable after acquiring that knowledge.

Mr. Wolff: All right.

Exam. Cheseldine: Now, it seems to me that if this exhibit is going to be made available to all parties and protestants at the end of the operating authority, that would be enough notice to you, and it actually could be considered as compliance with Schaeffer. Is there any objection to that?

I would like -- I don't want to see this case messed up with a lot of argument about the Schaeffer Case.

Mr. Martin: I don't know how fine this Schaeffer Case cuts, but we have -- we may have substitutions between the same company.

Exam. Cheseldine: That doesn't apply.

Mr. Martin: All right.

Exam. Cheseldine: We are interested in the company and a qualified witness. It doesn't make any difference whether it is Joe Doakes or Richard Rome.

Mr. Martin: Anybody who will endorse the statement?

Exam. Cheseldine: No. His assistant can come in as long as he is qualified.

Mr. Martin: All right.

Exam. Cheseldine: Yes?

Mr. Robbins: Bruce Robbins. I represent the Furniture Transportation Company. I have got two comments. One in connection with the proposal for a new service list, containing only the names of those protestants who either appeared here today or presented their positions in writing before this Examiner.

I strongly question the propriety of such a move. These protestants who failed to appear may have waived their right to express themselves as to the questions to be decided at this conference, but I don't believe they have waived their

participation in the proceeding.

The second point is that I get the impression that most of the public witnesses who will be testifying will be national shippers, and therefore their testimony, if it were to be presented as proposed, as it has been proposed so far, would be in Washington, D. C.

I therefore suggest that since many of the protestants, particularly my client, its position is not only territorial but also commodity-wise, and therefore I suggest that when the shippers' identity becomes known, their order of testimony at this initial hearing for the operating witnesses, that the commodities that they will be transporting also be disclosed and perhaps a grouping made at the Washington hearing for the presentation of shipper testimony, according to the commodities that are involved in the support.

Mr. Wolff: May I ask counsel a question?

Exam. Cheseldine: Yes.

Mr. Wolff: You mean electronic tubes would be heard in Kalamazoo or Albuquerque?

Mr. Robbins: No, that is not what I am suggesting. But if, for instance, your shipper of electronic tubes is a nationwide shipper, and in addition to 90 of your 100 witnesses, his testimony would be presented in Washington, since the interest of my client would be concerned primarily with furniture, he would not be interested in the testimony of your

electronic tube shipper. I am suggesting that many of your shippers will be shippers of specific commodities, and if several of them ship electronic tubes, then their testimony be presented with some kind of grouping in Washington, if they are national shippers.

Exam. Cheseldine: You want grouping on the basis of territory as well as commodities?

Mr. Robbins: Well, I would prefer -- I think it would depend --

Exam. Cheseldine: To the extent possible.

Mr. Robbins: I think it would depend upon the character of the shippers involved. I understand that many of them would be national accounts.

Mr. Wolff: He means --

Exam. Cheseldine: I understand what he means. You want a grouping to the extent possible of similar commodities and similar territories.

Mr. Robbins: Yes, I do.

Exam. Cheseldine: Thank you. That is reasonable. But there is nobody that has waived anything with respect to not appearing at this prehearing conference. There are still protestants of record.

Now, as to the listing, service lists can't be changed unless the party that is still a party withdraws from it, or there is something in the Commission order that says he must

do something or otherwise he will be stricken. And until a protestant has something before him to make a decision on, I don't believe the Commission could put out an order that they have got to do something, or otherwise it's stricken.

So I can't see how we can accomplish your suggestion in that line.

Mr. Wolff: Mr. Examiner, suppose REA Express undertook to write to each of these persons on the service list, and asked if each wished to be served with future documents, and those -- let's say those who at least respond that they no longer wish to be served or those for whom the address is incorrect --

Exam. Cheseldine: If you would do that, Mr. Wolff, and tell them to advise the Commission to strike their name off the service list, we will be glad to do so.

Mr. Wolff: Very well. We will try to do that. I say this because with no intention of cutting anybody off --

Exam. Cheseldine: I am only telling you the only way it can be done, that is all.

Mr. Wolff: We will do that.

Mr. Block: Would it be possible for protestants to be furnished with a copy of that service list?

Mr. Wolff: The Commission would be glad to do that. That is how we got it. There seem to be a couple of loose ends, Mr. Examiner.

Exam. Cheseldine: Wait a minute. Well, the best thing for you to do is designate a committee around here to get the copy from the Commission docket section. Any other loose ends?

Mr. Sigmon: I would like to make an additional appearance at a proper time.

Exam. Cheseldine: All right.

Are there any additional appearances at this time.

Mr. Robbins: I spoke before, yes.

My name is Bruce J. Robbins, law offices of Arthur J. Piken, 160-16 Jamaica Avenue, Jamaica, New York,10432. I am an attorney admitted to practice before the highest court of the State of New York, and I am admitted to practice before this Commission.

I represent the Furniture Transport Company, Inc., as a protestant.

Mr. Jordan: Harry J. Jordan, 1000 Sixteenth Street, N. W., Washington, D. C., I am an attorney admitted to practice before the Commission. I am representing McLean Trucking Company, Smith Transfer Corporation of Virginia and Bell Lines, Inc.

Mr. Sigmon: Mr. Examiner, Richard Sigmon, I previously entered my appearance for certain protestants.

David Millner, who represents six carrier protestants in this proceeding, was detained due to bad weather and asked

me to enter an appearance and represent the interests of those six clients for the purpose of this prehearing conference. Those carriers are Cargo Distribution Corporation, Eastern Freightways, Inc., Lake Shore Motor Freight Co., Long Transportation Co., Andrew McDermott, Inc., William McCullough Transportation Co., Inc.

Exam. Cheseldine: Now, any additional comments by other protestants?

Mr. Rose: Sir, did you make any ruling on the request to Mr. Wolff that the statements of the various protestants do not have to be circulated to other protestants?

In other words, if everybody has to make -- file a copy of his statement with all the other counsel of record, and I know that point was raised, but I did not hear you rule on it.

Exam. Cheseldine: Are you talking about protestants' statements?

Mr. Rose: Well, yes. I mean, for example, if I represent three short haul carriers in Missouri and I am sure a lot of these protestants and lawyers representing other protestants are not oging to be interested in their particular statement with respect to their operation, and I am just wondering if it is going to be necessary for each counsel to submit a copy of his statement to verify statements to all the other counsel of record.

Exam. Cheseldine: It hasn't been done in the past. I don't know why it should be started here.

Mr. Rose: I see. All right.

Mr. Wolff: Don't we have to serve all parties on the service list?

Exam. Cheseldine: He only has to serve the applicant. And intervenors of record. Intervenors in support. That is all. Because the protestants doen't know the other parties.

Mr. Jackson: I just with to call the written motion to your attention that I previously presented for the purpose of having that matter appear of record.

Exam. Cheseldine: Mr. Jackson, you haven't presented it on the record. You gave it to the Examiner before the hearing was called.

Mr. Jackson: Yes, sir, that was my purpose. I said I want to get it on the record at this time.

Exam. Cheseldine: Can you give a copy to the applicant's counsel?

Mr. Jackson: Yes, sir, prior to the hearing.

Exam. Cheseldine: Does applicant have anything to reply to this? Do you wish to reply to it?

Mr. Wolff: To what, Mr. Examiner?

Exam. Cheseldine: Well, you were supposed to have gotten a copy of this motion.

Mr. Wolff: I haven't had a chance to read it, Mr. Examiner. I believe under the rules we have twenty days in which to

reply.

Exam. Cheseldine: Do you want twenty days?

Mr. Wolff: Motion to dismiss?

Yes, I guess we should have whatever the rules permit, Mr. Examiner. I haven't read it.

Exam. Cheseldine: Well, suppose you -- you wanted some consideration here and I will give you ten minutes to read it and then you can tell me what you want to do about it.

Mr. Wolff: I think without reading it I can say I would like to have twenty days in which to respond to it, Mr. Examiner. Isn't that what the rules permit?

Exam. Cheseldine: Well, but then generally they permit that, but if we want to move this thing along, I don't want to wait around twenty days to decide for you to get this in and then us have to present it to the Commission.

Mr. Wolff: What length of time does the Examiner recommend that we have?

Exam. Cheseldine: Well, reasonable time. Just don't see any reason on a thing like this, that I probably could write it for you --

Mr. Wolff: This motion could have been made a long time ago, Mr. Examiner. It was just handed to me this morning.

Exam. Cheseldine: I think we are entitled to time to respond to it.

Exam. Cheseldine: I don't see any reason why we can't

get it moving. Just asking for the maximum time without even thinking about it.

Exam. Cheseldine: Mr. Jackson, do you have some additional copies of this motion?

Mr. Jackson: I have some. How many copies would you like?

Exam. Cheseldine: I would like about seven. Have you got a signed copy here?

Mr. Jackson: Yes, sir, the signed original, I believe, was given to the Examiner. Do you have the copy that I originally gave to you?

Exam. Cheseldine: Yes.

Mr. Jackson: That is a copy of the first motion.

Exam. Cheseldine: Off the record.

(Discussion off the record.)

Exam. Cheseldine: All right, come to order, gentlemen.

The Examiners do not feel that this is a time to rule on this motion to dismiss, even if they had the authority, which they do not.

At a prehearing conference -- it may be tendered to the Commission with the admonition to applicant's counsel to reply to it as soon as possible.

Mr. Wolff: We shall do that Mr. Examiner. I would like to note for the record that I believe this motion has previously been made and denied by the Commission. I think there

is a question of propriety of second commission --

Mr. Jackson: Not this motion. Not this motion.

Exam. Cheseldine: I --

Mr. Wolff: We need not take the time of the hearing with that sort of thing.

Exam. Cheseldine: Well, I would say that, if I recollect, this motion was -- a previous motion was denied at this time, and there has been a prehearing conference, and there is a little more information available to the Commission, so I would not rely entirely on your answer, strictly on the fact that it has been denied before.

Mr. Wolff: Thank you, Mr. Examiner.

Exam. Cheseldine: When the Commission has more information, sometimes it acts when it previously wouldn't act.

Is there anything else, gentlemen?

Mr. Wolff: I just wanted to be clear that in Mr. Sigmon's discussion of the matter of exchanging evidence in written form, I don't remember exactly what his agreement was, what he wanted to agree to. Is it ten days in advance of the time the witness will testify? And this, by the way, I assume -- and I want to be sure on the record, that this is clear, whatever we agree to.

Exam. Cheseldine: As far as I am concerned, nobody has agreed to anything. You have stated your position of what you would be willing to agree to.

Mr. Wolff: Perhaps we can secure agreement on this since it's an important issue for going forward with everything else in the case. I just want to be clear that it goes for both protestant and the applicant.

Exam. Cheseldine: Why does that necessarily follow?

Mr. Wolff: Mr. Examiner, the purpose of submitting written evidence in advance to expediting the hearing and make it more efficient, it seems to me that that purpose cuts both ways, -- that is, with respect to applicant's testimony, as well as protestants' testimony. It is unthinkable it should only be on one side.

Exam. Cheseldine: That is always the case?

Mr. Wolff: I beg your pardon?

Exam. Cheseldine: Is that always the case?

Mr. Wolff: I think it should be always the case.

Exam. Cheseldine: Well, that is your position. You have stated it. So why don't you just wait until the Commission's order comes out.

Mr. Wolff: Yes, sir.

Exam. Cheseldine: Because I first want to find out how we can work this proposition at the first session, the oral hearing, to reach agreement on the applicant's case. You can be assured that the Examiner will do the same thing for the protestants, if it is feasible at that time. That is how it works here.

Mr. Wolff: Yes, sir.

Exam. Cheseldine: Not agreement of parties. The Commission directs it.

Mr. Lakusta: I would simply reiterate the observation that was made by one or two others. I would hope the Commission would see its way clear to having at least one set of hearings in San Francisco, because I think the parties that we represent could most conveniently make their own position clear at that location, rather than here.

Exam. Cheseldine: Well, have you stated how many witnesses and how much time you require at that point?

Mr. Lakusta: We have stated it in our protest. I think we stated three days in total. I recognize that the operating case should probably be in Washington, and we would expect to be present for that. But for the shipper testimony, which is what I have in mind, I would hope that the order could be effected so that those shipments which involved West Coast shippers could be dealt with in San Francisco or Los Angeles.

Exam. Cheseldine: Are you talking about the applicant's case?

Mr. Lakusta: I am talking about the applicants' case.

Exam. Cheseldine: How can you estimate the time required for applicants' case in San Francisco?

Mr. Lakusta: No, I beg your pardon, Mr. Examiner. So

far as our -- I was talking about the protestants' case, in estimating the time that our testimony, protesting shipper testimony and other types of protesting testimony, would take.

Exam. Cheseldine: Then I asked how many witnesses and how long you expect to take?

Mr. Lakusta: I stated, sir, that I think it would be three days.

Exam. Cheseldine: That is the time. Now, how many witnesses?

Mr. Lakusta: Well, we have, I think we have seven protestants, and I believe that the number of witnesses would be in the order of fifteen.

Exam. Cheseldine: What kind of other witnesses are you going to have?

Mr. Lakusta: They would be operating witnesses. We might have one or two shipper witnesses, as well.

Mr. Axelrod: Mr. Examiner, I wasn't sure whether you were attempting to set any protestants time now. I didn't think so. But if you were, I would likewise to make a request for other locations for protestants' testimony. I didn't think this was the time that we were going to be concerned with that at the moment --

Exam. Cheseldine: Well,if you are not going to be at the operating hearing, why, now is the time.

Mr. Axelrod: We will be at the operating hearing.

Exam. Cheseldine: But there will be time to make your

representations then.

Mr. Axelrod: We intend to be at the hearing.

Exam. Cheseldine: That is why I was not thinking about protestants, when you asked for information about the time to present evidence, and just say three days, without telling me the number of witnesses, there is a big disagreement as to time required for witnesses on one part and other parts of the country.

Mr. Kinker: Bob Kinker, Mr. Examiner.

Exam. Cheseldine: Just a minute, Mr. Kinker. I have one more question. If the protestants' witnesses have their prepared evidence, and all they have to do is go on the stand for cross-examination, do you mean to tell me that you need three days to hear the evidence of seven carriers?

Mr. Lakusta: That probably is an outside limit, and I did have in mind, it would include extensive cross-examination, perhaps it could be done in a day.

Mr. Kinker: I am correct, am I not, sir, that at the first few days of the hearing involving applicant's operating witnesses, that a determination will be begun to be made at that time to the location for the hearing of applicant's public witnesses? Is that correct?

Exam. Cheseldine: That is a proposal that I made that seems like nobody objected to it too much.

Mr. Kinker: Thank you.

Exam. Cheseldine: Were there any objections to it?

At least that will be the first permanent time that the Examiner will have an indication of the scope of the witness' testimony and how many there are.

Mr. Hill: If the Examiner please, my name is Hill. I would like to inquire of applicant's counsel at this time whether the applicant has under consideration on contemplates any restrictive amendments to the applicant's prior to the commencement of the hearing.

Mr. Wolff: I think the answer to that is no.

Mr. Hill: Thank you.

Exam. Cheseldine: Is there anything else, gentlemen?

Mr. Hill: Thank you.

Exam. Cheseldine: Is there anything else, gentlemen?

Mr. Coker: Mr. Sigmon mentioned something regarding that certain testimony should be included in shipper's statements. I would like to know what status of that is. I don't think specific indications should be made at any prehearing conference order as to what shippers' testimony should contain. That should be dependent upon whatever the law is, and that should be sufficient.

Exam. Cheseldine: Did you suggest that the Commission specify?

Mr. Sigmon: Yes, I did. I was suggesting that to the extent any shipper's testimony included allegations of in-

adequate existing service, that we should try to deal with specifics, rather than just the generalities.

Exam. Cheseldine: You don't have any objection to that, do you, Mr. Coker?

Mr. Wolff: I am not sure I agree with that, Mr. Examiner. I am not sure I agree. I didn't know we were going to agree to anything here today.

Exam. Cheseldine: Well, I doubt if you will.

Mr. Wolff: I don't want anything I have said to sound as though I agree with anything Mr. Sigmond has said.

Exam. McKiel: He says it should be done in all cases, but it seldom is.

Mr. Wolff: I understand Mr. Sigmon was making comments as to what he would like to see in the testimony and he is free to comment.

Exam. Cheseldine: He is trying to put you on notice that if you want to make allegations that are worth anything, that they ought to be specific.

Mr. Wolff: In his opinion, worth anything.

Exam. Cheseldine: That is right.

Mr. Wolff: Yes, I understood that.

Mr. Robson: We appreciate his counsel.

Mr. Bernhard: I am not at all clear as to where this discussion has gone in terms of what has been brought up earlier, that counsel for applicants would make available to protestants some underlying documents, and I wasn't clear beyond that

whether or not anybody would be expected to go to an underlying document if no abstracts were prepared. Is the sense of this that there will be abstracts of there won't be abstracts, and under what circumstances and what advance notice will be given to protestants to see underlying documents?

Exam. Cheseldine: I don't believe that Mr. Wolff knows whether he is going to use abstarcts of shipments, is that correct?

Mr. Wolff: I would like to accommodate counsel's interest in knowing the answer to the question, but I don't think that the answer to the question of whether you will have reasonable access to underlying work papers turns on the answer to the question, whether abstracts are going to be used or not. And you must agree with that, that is not really relevant to your question.

Mr. Bernhard: I don't agree with that at all. It's entirely relevant.

Exam. Cheseldine: All right, then don't bother about it. It will be put in the order.

Mr. Wolff: Well, we will give you, as well as our counsel, reasonable access to underlying work papers, whether they go to the abstracts or not. You are not interested only in abstracts, are you?

Mr. Bernhard: I don't want to be presented, Mr. Wolff, with a whole raft of underlying documents without any direction

to them as to what they are being put in for.

Exam. Cheseldine: I am coming to that. What was the date that you suggested for the hearing on the operating testimony?

Mr. Axelrod: March 30.

Exam. Cheseldine: What date before that will you have the operating testimony available for distribution to the parties?

Mr. Robson: Ten days.

Mr. Wolff: We can prepare to be instructed ten days prior to the day each witness will testify. That is, starting on the 20th, we will have the first day's witness' testimony.

Exam. Cheseldine: I don't want it that way. I want the whole thing.

Mr. Wolff: At once, all at once, Mr. Examiner?

Exam. Cheseldine: Just tell me when you are going to be ready to have the whole business set up, so you know what is going to be presented and so do the parties.

Mr. Jackson: You are speaking now only of the operating case?

Exam. Cheseldine: That is right.

Mr. Wolff: Well, --

Exam. Cheseldine: You were complaining about mailing it to all these parties. If you had to do it seven or eight times, it would be a whole lot more trouble than doing it once.

Mr. Wolff: The 20th of April, Mr. Examiner, we would have all operating evidence.

Mr. Axelrod: You mean March?

Mr. Wolff: No, I mean April.

Exam. Cheseldine: Wait a minute --

Mr. Axelrod: You were going to start March 30.

Mr. Wolff: But if I have to have it completed, I need a little extra time.

Mr. Robson: I think what Mr. Axelrod means that is the hearing would go forward to that date. The date of the hearing, if it is all to be submitted at once --

Mr. Axelrod: I understood you intended to start the hearing on March 30. I am sorry.

Mr. Wolff: I had originally suggested that date.

Mr. Axelrod: Yes.

Mr. Wolff: But if I have to have all operating evidence completed at the same time, I would like to have a little more time.

Exam. Cheseldine: I don't like you to say I have to have. I don't know how in the world you can start a hearing on the operating testimony without having it all complete.

Mr. Robson: Move it ahead 30 days. Twenty to thirty days.

Mr. Wolff: That is, the hearing would --

Exam. McKiel: You want to start the hearing ten days after April 20? Is that what you are suggesting?

Mr. Wolff: Yes, Mr. Examiner.

Exam. Cheseldine: Well, you tell us when you will be ready to go forward with all of the operating testimony prepared and ready to be distributed?

Mr. Wolff: April 20.

Exam. Cheseldine: All right.

Mr. Barrett: Will the statements be served on April and you will go ahead with the hearing on April 30? Is that it?

Exam. Cheseldine: I want to know when he will be completely ready to go forward and have the complete oral testimony, I mean the oral testimony reduced to writing, of his operating witnesses, and he says April 20.

Mr. Axelrod: But the hearing, it commences --

Exam. Cheseldine: It will have to commence in May.

Mr. Axelrod: What day is April 30?

Mr. Robson: That is a Thursday.

Mr. Block: That is in the middle of the motor carriers convention.

Exam. Cheseldine: I know it is.

Mr. Axelrod: Why don't you commence on a Monday?

Mr. Wolff: I would have no problem with commencing on Monday, Mr. Axelrod.

Exam. Cheseldine: We are not fixing a definite date now.

Mr. Axelrod: I see.

Exam. Cheseldine: Anything further, gentlemen?

Mr. Sigmon: On this point, Mr. Examiner, we are now talking in terms of the operating evidence, taking more than 90 days to get ready. I think that this is an extremely long time, particularly in view of the fact that PEA has been operating under this temporary authority for over 20 months now, and I would like to see that date cut back, if possible, and to get this hearing started certainly no later than March 30, if we can do it.

Mr. Block: I agree.

Mr. Jackson: I think this case was previously set down for the actual commencement of the hearing on today's date, and this was changed by order of the Commission, changed to a pre-hearing conference, and I certainly have no criticism of that at all. But I do think that applicant should, at this time, have made substantial preparation in getting his operating testimony together and I think that the date stipulated or suggested by counsel for the applicant is not necessarily an attempt to drag feet, but certainly is an inordinately long time to wait, a long time away from now.

Mr. Wolff: Mr. Examiner, you are talking about three weeks, sir. That is the difference between the date Mr. Sigmon suggested and the date we suggested. Three weeks, in a case that I don't think anybody in this room can estimate how long it is going to take, and I certainly want to make quite clear that there is no dragging of feet on our part here.

Mr. Block: Almost three months to the proposed date.

Mr. Jackson: This is a case the applicant is presently operating under temporary authority, Mr. Examiner, and I think that puts certainly a somewhat different light on it from the usual case.

Mr. Wolff: What date do you recommend that we commence?

Mr. Jackson: As promptly as possible.

Mr. Wolff: Well, that is not very helpful. Give me a date.

Mr. Jackson: All right.

How about 30 days from today?

Mr. Wolff: That is a very short length of time, Mr. Sigmon recognized that and he suggested March 30.

Exam. Cheseldine: No, you suggested March 30.

Mr. Robbins: All we are speaking of is the operating authority?

Exam. Cheseldine: Yes.

Mr. Robbins: I can't see what problem is in going forward with your operating testimony. All this time you are conducting temporary operations for a substantial period of time. I can't see any reason for more than thirty days.

Exam. Cheseldine: Maybe Mr. Wolff has an excuse for it. I don't know.

Mr. Wolff: I don't have any excuse, Mr. Examiner. I have an explanation.

Exam. Cheseldine: All right. Let's have that.

Mr. Wolff: This is obviously a complex case, with a lengthy application. The operating evidence will have to be prepared in great detail.

Exam. Cheseldine: Has any preparation been made up until now?

Mr. Wolff: Of course it has, Mr. Examiner.

Exam. Cheseldine: Then why weren't you able to describe in more detail what the proposal is?

Well, I don't think we are getting anywhere, gentlemen. The only thing I want to make clear, that we will give Mr. Wolff, the Commission will give Mr. Wolff, is time that you have requested, with the understanding that you will either have the shipper witnesses' testimony completed, or you will have a list of the shippers with a scope of their testimony, and that will be the shippers that are going to support this application and no others.

Mr. Wolff: We will definitely have the list of shippers, Mr. Examiner.

Exam. Cheseldine: You are going to have plenty of time to find out what they are going to cover, because I want to set this case for hearing here in Washington or other points with an idea that we are going to get through on the allotted time and it can't be done unless I know what we are setting for hearing.

Mr. Wolff: You have our assurance, Mr. Examiner, that the

list of witnesses and scope of testimony will be prepared on time.

Exam. Cheseldine: And any complete testimony that you have finished by then?

Mr. Wolff: We will do our best to produce it by that time.

Exam. Cheseldine: With that understanding, we will set the operating testimony hearing shortly after the first of May. And then we will move forward quickly after that.

Mr. Block: And he is to submit the operating testimony ten days before May 1?

Exam. Cheseldine: It will be in the order assigning it for hearing.

Mr. Martin: I would like to make it clear for the record that our people have not agreed with Mr. Sigmon's specific indications as to what evidence and how we should present it.

Exam. Cheseldine: There is no requirement that you submit any evidence. That will answer your question.

Mr. Martin: Well, that wasn't what I was talking about, sir. He made some suggestion as to how the shipper testimony should be set up and presented.

Exam. Cheseldine: If you have no obligation to submit any testimony, you surely can submit what you want to. Do I make myself clear?

Mr. Martin: Well, there is some implication a little while

ago that something Mr. Sigmon suggested was a very good suggestion and other people agreed with it. I want to make sure my disagreement is on the record, that is all.

Exam. Cheseldine: Well, I am not going to say one way or the other. I am merely going to say one way or the other. I am merely going to say that you can put in anything you want. You can attempt to. If the Examiner will receive it. But I am not trying and the Commission doesn't want to bind him with your suggestion.

Mr. Martin: I have no further comments.

Exam. Cheseldine: I tried to make it as clear as possible without telling you a direct answer to your question because I don't think it is proper for me to tell you a direct answer to your question. You have counsel, don't you?

Mr. Martin: Mr. Examiner, I didn't ask a question. I asked that I be permitted to say on the record that I disagreed with him.

Exam. Cheseldine: I am sorry, I thought it was in the form of a question.

Mr. Martin: No, sir.

Exam. Cheseldine: All right. I misunderstood it as a question. I am sorry. All right, if there is nothing further, the hearing is closed, and thank you.

(Whereupon, at 11:50 o'clock a.m. the prehearing conference was concluded.)

-ooo-

Docket MC-66562 (Sub 2345) (Part 181)

C.I. 199

SERVICE DATE
JANUARY 16, 1970

ORDER

INTERSTATE COMMERCE COMMISSION

No. MC-66562 (Sub-No. 2314)

RAILWAY EXPRESS AGENCY, INCORPORATED
(New York, N. Y.)

PRESENT: Rupert L. Murphy, Commissioner, to whom the matter which is the subject of this order has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceeding, and of petition of the Secretary of the Army, through duly authorized counsel, on behalf of the Department of Defense, filed January 8, 1970, for leave to intervene in support of the application; and good cause appearing therefor:

It is ordered, That petitioner be, and it is hereby, permitted to intervene in said proceeding with the right to appear and participate in all further proceedings therein.

Dated at Washington, D.C., this 9th day of January, 1970.

By the Commission, Commissioner Murphy.

H. Neil Garson

H. NEIL GARSON,
Secretary.

(SEAL)

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Docket MC-66562 (Sub 2345) (Part 181) C.I. 202

ORDER

SERVICED DATE
FEBRUARY 9, 1970

INTERSTATE COMMERCE COMMISSION

No. MC-66562 (Sub-No. 2314)

RAILWAY EXPRESS AGENCY, INCORPORATED
(New York, N. Y.)

IN THE MATTER OF PETITION FOR LEAVE TO INTERVENE

SENT: Rupert L. Murphy, Commissioner, to whom the matter which is the subject of this order has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceeding, and of petition of American Retail Federation, filed January 9, 1970, for leave to intervene; and good cause appearing therefor:

It is ordered, That petitioner be, and it is hereby, permitted to intervene in said proceeding with the right appear and participate in all further proceedings therein.

Dated at Washington, D. C., this 2nd day of February, 1970.

By the Commission, Commissioner Murphy.

H. Neil Garson

H. NEIL GARSON,
Secretary.

(SEAL)

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Docket MC-66562 (Sub. 2345) (Part 181) C.D. 207

February 13, 1970

Mr. John E. Robson
Leibman, Williams, Bennett,
Baird and Minow
1156 Fifteenth Street, N. W.
Washington, D. C. 20005

Dear Mr. Robson:

This replies to your inquiry of February 9, 1970, requesting prompt advice with regard to the change of the corporate name of Railway Express Agency, Inc., to REA Express Inc., and the manner it can be effectuated in the Commission's records. The steps outlined in your letter of February 9 constitute the proper procedure to be followed.

I would like to take this opportunity to call your attention to the promise that was made to the Commission with respect to the many pending applications of REA for permanent operating authority which have been superseded by the omnibus Sub-2314 application. When that application was filed, the Commission was assured that steps would be taken as soon as possible thereafter to clear the docket of a large number of pending motor carrier permanent authority applications as well as simplifying the temporary authority application filings. I personally have spoken to and written REA officials several times as have other members of this office. The last time was with Mr. Wolff of your office within the past several weeks when he was given a computer machine print out of the sub-numbered permanent authority dockets with which we are covered. To date, we still have heard nothing. There also is the matter of a petition filed by REA with this Commission and the CAB concerning which Director Stillwell has attempted to contact you without success. It would be much appreciated if cooperation could be a two-way street, and that an accommodation with respect to these matters might be reached. Your prompt advice in these matters would be most appreciated.

Sincerely yours,

Sheldon Silverman
Director (Acting)

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MC-66562 (Sub 2345) (Part 181) C.I. 206

SERVICE DATE
FEBRUARY 25, 1970

ORDER

INTERSTATE COMMERCE COMMISSION

No. MC-66562 (Sub-No. 2314)

RAILWAY EXPRESS AGENCY, INCORPORATED
(New York, N. Y.)

IN THE MATTER OF PETITION FOR LEAVE TO INTERVENE

REPORT: Rupert L. Murphy, Commissioner, to whom the matter which is the subject of this order has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceeding, and of petition of The National Retail Merchants Association filed February 11, 1970 for leave to intervene; and good cause appearing therefor:

It is ordered, That petitioner be, and it is hereby, permitted to intervene in said proceeding with the right to appear and participate in all further proceedings therein.

Dated at Washington, D. C., this 17th day of February, 1970.

By the Commission, Commissioner Murphy.

H. Neil Garson

H. NEIL GARSON,
Secretary.

(SEAL)

MC-66562 (Sub 2345) (Part 181) C.I. 208

ORDER

SERVICE DATE
MAY 7, 1970

INTERSTATE COMMERCE COMMISSION

No. MC-66562 (Sub-No. 2314)

RAILWAY EXPRESS AGENCY, INCORPORATED
(New York, N. Y.)

IN THE MATTER OF PETITION FOR LEAVE TO INTERVENE

PRESENT: Rupert L. Murphy, Commissioner, to whom the matter which is the subject of this order has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceeding, and of petition of The U.S. Atomic Energy Commission, filed April 15, 1970, for leave to intervene; and good cause appearing therefor:

It is ordered, That petitioner be, and it is hereby, permitted to intervene in said proceeding with the right to appear and participate in all further proceedings therein.

Dated at Washington, D. C., this 23rd day of April, 1970.

By the Commission, Commissioner Murphy.

H. Neil Garson
H. NEIL GARSON,
Secretary.

(SEAL)

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MC-66562 (Sub 2345) (Part 181) C.T. 209

LAW OFFICES

SCHINDEL & COOPER

KALMAN S. SCHINDEL
HYLAN COOPER
ANDREW M. SCHINDEL
STEPHEN F. SCHINDEL

450 SEVENTH AVENUE, NEW YORK, N.Y. 10001

TELEPHONE 244-5575
PROCEDURES

RECEIVED
AUG 10 12 45 PM '70

August 4, 1970

INTERSTATE COMMERCE COMMISSION
Received
AUG 7 1970
SECRETARY'S OFFICE

Section of Operating Rights
Interstate Commerce Commission
Washington, D. C. 20423

Re: Railway Express Agency, Inc.

Gentlemen:

Could you please advise us whether Railway Express Agency, Inc. has over-the-road operating authority between Anderson, South Carolina, and the Atlanta, Georgia, airport.

If so, could you please advise us of the docket number assigned to this operating authority.

Very truly yours,

SCHINDEL & COOPER

Kalman S. Schindel

KSS:fp

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MC-66562 (Sub 2345) (Part 181) C.I. 21-U

August 18, 1970

Mr. Kalman S. Schindel
Schindel & Cooper
450 Seventh Avenue
New York, New York 10001

Dear Mr. Schindel:

This replies to your letter of August 4, 1970, inquiring whether Railway Express Agency, Inc., is authorized to perform service between Atlanta Municipal Airport, Atlanta, Ga., on the one hand, and, on the other, Anderson, S. C.

REA presently is operating in what it terms a "Hub" system throughout the United States, pursuant to temporary authority issued by this Commission in No. MC-66562 (Sub-No. 2308 TA). A corresponding application for permanent authority has been filed in No. MC-66562 (Sub-No. 2314). The latter proceeding has not yet been the subject of oral hearing, but the temporary authority, under the provisions of the Administrative Procedure Act, will remain in force until final disposition of the permanent application proceeding.

Route 10-4, as identified in both the temporary authority and permanent authority application, authorizes REA to perform service between Atlanta and Greenville, S. C., and between Greenville and Anderson. Additionally, there are numerous other combinations of routes which REA could join to perform this service.

It appears that the Atlanta Airport may not be within the corporate limits of Atlanta. If this is the case, REA would be able to serve the airport only if it had filed a terminal area tariff for Atlanta naming the airport, or the territory in which the airport is located, as a service point. As a corollary, if REA holds authority to serve points on Interstate Highway 85 south of Atlanta, it would be able to serve

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the airport. Because REA's route authorizations are so numerous, and its tariff filings so voluminous, it would be unduly burdensome to determine the method by which REA claims the right to serve the airport.

Should you desire further assistance in this matter, you may wish to contact the Commission's Regional Manager at Atlanta, James B. Weber, Room 300, 1252 Peachtree Street, N.W., Atlanta, Ga. 30309 (404-526-5371).

Very truly yours,

Henry U. Snavely
Deputy Director
Section of Operating Rights

MC-66562 (Sub 2345) (Part 181) C.I. 2-12

Leibman, Williams, Bennett, Baird and Minow

1156 FIFTEENTH STREET, N. W. · WASHINGTON, D. C. 20005 · 202 833-8606

CHICAGO OFFICE
ONE FIRST NATIONAL PLAZA
CHICAGO, ILLINOIS 60670
312-329-7700

August 19, 1970

Arthur M. Wisehart, Esq.
Vice President and General Counsel
REA Express, Inc.
219 East 42nd Street
New York, New York 10022

Re: MC-66562 (Sub 2314)

Dear Art:

I received a telephone call today from Mr. Sheldon Silverman, Director of the ICC's Office of Proceedings. He is quite concerned that we have not advised him as to our intentions in the Hub proceedings. In addition, Mr. Silverman reminded me that to date only four of the many pending applications for authority have been withdrawn by REA and there has been no further action in the matter involving Motor Transport.

I explained to Mr. Silverman that everyone at REA has been fully committed over the past six weeks to dealing with various aspects of Air Express, including CAB and court litigation. I told Mr. Silverman that we would make every effort to get back to him on the Hub case within the next week or ten days.

Sincerely,

Elroy H. Wolff

cc: John J. C. Martin, Esq.
Sheldon Silverman, Esq.
EHW/kas

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MC-66562 (Sub 2345)(Part 181) C.I. 216

ARTHUR J. PIKEN
Counselor at Law

212 592-8700

Bruce J. Robbins
Robert W. Piken

Suite 1515
One Lefrak City Plaza
Flushing, N. Y. 11368

July 29, 1974

Robert L. Oswald, Secretary
INTERSTATE COMMERCE COMMISSION
Washington, D. C. 20423

RE: Docket No. MC-66562 (Sub-No. 2314)
Railway Express Agency, Incorporated

Dear Mr. Oswald:

In connection with the above-captioned application proceeding, this office filed a protest in behalf of The Furniture Transport Company, Inc. on January 17, 1969. The last correspondence we have in our file on this matter from your Commission is an Order dated May 7, 1970.

Kindly advise the present status of this matter.

Very truly yours,

ARTHUR J. PIKEN

AJP:bja

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MC-66562 (Sub 2345) (Part 181) C.I.

August 23, 1974

Arthur J. Piken, Esquire
Suite 1515
One Lefrak Plaza
Flushing, New York 11368

Dear Mr. Piken:

This replies to your letter of July 29, 1974, concerning the status of the application of REA Express, Inc., in No. MC-66562 (Sub-No. 2314), REA's so-called "Hub" application.

A pre-hearing conference was held in this matter on January 1, 1970. No date has been set for formal hearing in this proceeding. As you are no doubt aware, this application envisions a nationwide system of routes comprised of a multitude of both REA's presently held authorities as well as newly applied for operating rights. The problems thus raised by a proceeding such as this are as massive as the application itself.

I regret that I am unable to suggest the processing time for this proceeding in the light of its unusual nature.

Sincerely yours,

J. Patterson King
Deputy Director
Section of Operating Right

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MC-66562 (Sub 2345) (Part 181) C.I.

SERVICE DEC 219

JAN 9 1975

ORDER

INTERSTATE COMMERCE COMMISSION

No. MC-66562 (Sub-No. 2345)[1]

REA EXPRESS, INC., DOCKET CONSOLIDATION
(New York, N. Y.)

PRESENT: Rupert L. Murphy, Commissioner, to whom the matter which is the subject of this order has been assigned for action thereon.

It appearing, That REA Express, Inc., presently has pending before this Commission, a number of applications including the 193 applications listed in the appendix hereto; that the monitoring of these applications by this Commission would be greatly facilitated by the consolidation of these requests for permanent authority into a single application proceeding; that these applications involve many similar issues and are related to REA's "hub" distribution concept; that this consolidation places no added burden upon REA, but merely is an internal Commission redesignation of REA's pending cases; that each appropriate sub-numbered proceeding listed in the appendix will become a specified part of the consolidated docket; that the specified part numbers are listed in parenthesis following the appropriate sub-numbered proceeding they replace in the appendix to this order; that the consolidation of the 193 applications listed in the appendix hereto should be accomplished under the titled caption above; and that in light of this consolidation the 193 proceedings listed in the appendix to this order can be dismissed with no prejudice to REA;

It further appearing, That these permanent applications permit REA to continue operations pursuant to related temporary authorities; that this administrative action will not affect REA's operations under its temporary authorities;

It is ordered, That the 193 proceedings listed in the appendix to this order be, and they are hereby, consolidated in the manner described above into a single proceeding No. MC-66562 (Sub-No. 2345).

---

[1] Embraces those proceedings listed in the appendix to this order.

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MC-66562 (Sub 2345) (Part 181) C.I.

SERVICE DEC 219

JAN 9 1975

ORDER

INTERSTATE COMMERCE COMMISSION

No. MC-66562 (Sub-No. 2345)[1]

REA EXPRESS, INC., DOCKET CONSOLIDATION
(New York, N. Y.)

PRESENT: Rupert L. Murphy, Commissioner, to whom the matter which is the subject of this order has been assigned for action thereon.

It appearing, That REA Express, Inc., presently has pending before this Commission, a number of applications including the 193 applications listed in the appendix hereto; that the monitoring of these applications by this Commission would be greatly facilitated by the consolidation of these requests for permanent authority into a single application proceeding; that these applications involve many similar issues and are related to REA's "hub" distribution concept; that this consolidation places no added burden upon REA, but merely is an internal Commission redesignation of REA's pending cases; that each appropriate sub-numbered proceeding listed in the appendix will become a specified part of the consolidated docket; that the specified part numbers are listed in parenthesis following the appropriate sub-numbered proceeding they replace in the appendix to this order; that the consolidation of the 193 applications listed in the appendix hereto should be accomplished under the titled caption above; and that in light of this consolidation the 193 proceedings listed in the appendix to this order can be dismissed with no prejudice to REA;

It further appearing, That these permanent applications permit REA to continue operations pursuant to related temporary authorities; that this administrative action will not affect REA's operations under its temporary authorities;

It is ordered, That the 193 proceedings listed in the appendix to this order be, and they are hereby, consolidated in the manner described above into a single proceeding No. MC-66562 (Sub-No. 2345).

---

[1]Embraces those proceedings listed in the appendix to this order.

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It is further ordered, That the said sub-numbered proceedings listed in the appendix hereto be, and they are hereby, dismissed.

Dated at Washington, D. C., this 8 th day of January , 1975.

By the Commission, Commissioner Murphy.

Robert L. Oswald

(SEAL)

ROBERT L. OSWALD,
Secretary.

NOTE: This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

MC-66562
(Sub No. 2345 X Part 18)
C. I. 220

BEFORE THE

INTERSTATE COMMERCE COMMISSION

DOCKET NO. MC-66562 (SUB-NO. 2314) AND
DOCKET NO. MC-66562 (SUB-NO. 2308 TA)

REA EXPRESS, INC.,
HUB-TO-HUB TEMPORARY AND
PERMANENT AUTHORITY APPLICATIONS

PETITION SEEKING DISMISSAL OF THE
MC-66562 (SUB-NO. 2314) PERMANENT AUTHORITY APPLICATION
AND FOR CANCELLATION OF THE
MC-66562 (SUB-NO. 2308 TA) TEMPORARY AUTHORITY

Peter T. Beardsley
Robert L. James
Nelson J. Cooney
1616 P Street, N.W.
Washington, D. C. 20036

Richard R. Sigmon
618 Perpetual Building
Washington, D. C. 20004

Filed: December 1, 1975

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BEST COPY AVAILABLE

BEFORE THE

INTERSTATE COMMERCE COMMISSION

DOCKET NO. MC-66562 (SUB-NO. 2314) AND
DOCKET NO. MC-66562 (SUB-NO. 2308TA)

REA EXPRESS, INC.,
HUB-TO-HUB TEMPORARY AND
PERMANENT AUTHORITY APPLICATIONS

PETITION SEEKING DISMISSAL OF THE
MC-66562 (SUB-NO. 2314) PERMANENT AUTHORITY APPLICATION
AND FOR CANCELLATION OF THE
MC-66562 (SUB-NO. 2308TA) TEMPORARY AUTHORITY

Comes now American Trucking Associations, Inc. (ATA), and files this petition pursuant to Rule 102 of the General Rules of Practice, requesting the Commission to dismiss the Sub 2314 permanent authority application for want of prosecution, to cancel the Sub 2308 temporary authority granted by order dated June 3, 1968, and to hold that such temporary authority is void and of no force and effect.

ATA is the national organization of the trucking industry representing all types of motor carriers of freight, both for-hire and private. It is a non-profit corporation organized and existing under the laws of the District of Columbia, with offices at 1616 P Street, N.W., Washington, D. C. 20036.

I

STATEMENT OF THE CASE

By applications dated March 21, 1968, and April 9, 1968, in Docket Nos. MC-66562 R-452 and MC-66562 (Sub-No. 2308 TA), Railway Express Agency, Inc., [1] sought emergency temporary authority and temporary authority, respectively, for a total period of 180 days to restructure its then existing operations to a so-called Hub system. The REA proposal was summarized in the April 3, 1968, order in the R-452 proceeding as involving performance of service between 24 Hub cities in the United States over a network of routes referred to as the "Primary System, Hub-to-Hub," both then authorized and sought in the applications, and a so-called "Secondary-System, Hub-to-Satellite" service over a network of routes both then authorized and sought, radiating from the various Hub cities to various points in its service areas.

Numerous protests were filed to both the Emergency Temporary Authority and the Temporary Authority applications. By order dated March 26, 1968, in the R-452 ETA proceeding, the Temporary Authorities Board (now designated the Motor Carrier Board) denied the ETA application. On reconsideration, by the April 3, 1968, order, the entire Commission vacated and set aside the Board's order and granted the requested temporary authority for a period of 30 days. By order dated April 30, 1968, in the R-452 proceeding, the Commission permitted various associations and individual carriers to intervene in the proceeding and denied various petitions for reconsideration and/or postponement of the effective date of the April 3, 1968, order. Petitioner believes that two 30-day extensions of that Emergency Temporary Authority were granted.

[1] Now known as REA Express, Inc., and referred to hereinafter as REA.

By order dated June 3, 1968, in the Sub-No. 2308 Temporary Authority proceeding, the Commission, Division 1, granted REA temporary authority for a period of 90 days commencing no sooner than July 2, 1968, to perform a comparable service. By order dated August 12, 1968, the Commission, Division 1, denied various petitions for reconsideration of the June 3, 1968, order and overruled an embraced motion to stay said order. By letter dated September 10, 1968, the Secretary of the Commission declined to accept for filing a petition in the Sub-No. 2308 TA proceeding seeking a finding that an issue of general transportation importance was involved. By order dated October 28, 1968, Division 1, acting as an Appellate Division, denied a joint petition of various protestants requesting a finding that an issue of general transportation importance was involved, or alternately, that the entire Commission grant reconsideration.

In Saginaw Transfer Co. v. United States, 312 Fed. Supp. 662 (E.D. Mich., 1970), the United States District Court dismissed a complaint against the grant of that temporary authority.

In Docket No. MC-66562 (Sub-No. 2314), by application filed May 29, 1968, and published in the Federal Register of November 23, 1968 (pp. 17502-17616), REA sought permanent authority for the Hub-to-Hub and Satellite-to-Hub operation. Numerous protests were filed to that application.

By letter dated August 22, 1968, the Secretary of the Commission notified REA that, since it had complied with the requirement under 49 C.F.R. Part 1101 it could continue the temporary authority operation until further order of the Commission but not beyond the time of final determination of the Sub 2314 application for permanent authority.

In Docket No. 66562 (Sub-No. 2337 TA) dated March 1, 1971, REA applied for authority "to operate motor vehicles transporting commodities generally moving in express service between all points in the United States over non-radial irregular routes." In the statement in support of the application, REA declared that it had been operating under the Hub system since April 3, 1968, (almost 3 years), that its then new management had "exerted every effort to make the Hub system adequate for REA and the public," but that the Hub system nevertheless has proved to be both costly and inefficient for REA, and inadequate in providing service to the public. (pp. 1-2) The statement also declared that an analysis by A. T. Kearney & Co., Transportation Consultants, led to the conclusion that "there is no way that REA's present authority can be used to provide the flexible, efficient, economical service required for express operations in today's world." It went on to describe the "defects" in the Hub System. By order dated June 30, 1971, Division 1 denied the application for temporary authority and, by order dated August 6, 1971, the Commission denied various petitions for reconsideration.

By applications filed on or about November 22, 1971, in Docket Nos. MC-66562 R-471 and MC-66562 (Sub-No. 2344 TA), REA sought emergency temporary authority and temporary authority to transport general commodities, with exceptions, in express service, over irregular routes, between all points in the United States, restricted (1) against the transportation of any piece weighing more than 1,000 pounds; (2) against the transportation of any shipment weighing more than 10,000 pounds; and (3) to the performance of service between those points in the United States listed in REA tariffs published and on file with the Commission as of November 15, 1971.

In its argument in support of the application, applicant stated:

> "Because of the type of operation that REA is forced to conduct under its present Hub authority, REA has suffered losses which have been staggering." (p. 6)

In its report dated December 7, 1971, denying the R-471 emergency temporary authority application, the Commission, noting that REA's shipments had declined and that its losses had increased during fiscal years 1968-1971, stated:

> "This experience of REA has not, it must be emphasized, occurred as a result of this Commission's refusal to permit the carrier's management the widest latitude possible. Rather, it is the result of REA's own miscalculations, albeit by a previous management team. Nonetheless, REA came before this Commission less than 4 years ago, pleading imminent financial doom and debilitating operational problems, to restructure into the Hub system. This, according to a management assumedly responsible and capable, was REA's only possible salvation. That their judgment was less than accurate, viewed from the advantage now of hindsight, cannot be gainsaid." 2/

By letter dated January 31, 1972, REA withdrew the Sub 2344 temporary authority application and that application was dismissed by order dated February 2, 1972.

II

ARGUMENT

A. The Sub 2314 Permanent Authority Application Should Be Dismissed For Want of Prosecution

As indicated in the statement of the case, REA filed its Sub 2314 application for permanent authority on May 29, 1968, and a summary of that

2/ REA Express, Inc., Application for ETA, 117 M.C.C. 80, 87 (1971).

authority was published in the Federal Register of November 23, 1968. Since that time, and particularly since March 8, 1971, when it filed the Sub-No. 2337 TA irregular-route authority application repudiating the Hub concept, REA has made no effort to prosecute the Sub 2314 permanent Hub authority application. On the contrary, as noted above, in the Sub-No. 2337 TA application, REA declared that the Hub system was costly and inefficient for REA and inadequate to provide service to the public, supporting such conclusion by reference to a study by outside traffic consultants. Furthermore, on November 22, 1971, in the R-471 and Sub 2344 ETA and TA applications, REA contended that operations under the Hub temporary authority resulted in "staggering" losses.

It is evident from its lack of action over the intervening seven-year period and from its condemnation of the Hub authority in the Subs 2337 and 2344 temporary authority applications, that REA had no desire to prosecute the Sub 2314 permanent Hub-to-Hub authority application.

Rule 247(f) of the special rules governing applications for operating authority contemplates the prompt prosecution of such applications or their withdrawal and/or dismissal to bring the matter to prompt disposition. The continued pendency of the Sub 2314 permanent authority application violates the spirit and intent of that rule if not its literal terms. The time is long past due when REA should either have prosecuted the Sub 2314 application or requested that it be dismissed.

B. The Sub 2308 Temporary Authority Should Be Promptly Cancelled

The Sub 2308 temporary authority has remained outstanding since the initial grant of emergency temporary authority on April 3, 1968, only because the related Sub 2314 permanent authority application has been in a pending status.

Section 558(c) of the Administrative Procedure Act (5 U.P.C. §558(c)) provides, in part, that:

> When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

In Pan-Atlantic St. Corp. v. Atlantic C. L. R., 353 U.S. 436 (1957), the Supreme Court held that temporary authority issued under parallel provisions in Part III of the Act is a "license" within the meaning of the Administrative Procedure Act and comes within the quoted provision of that Act.

Section 1101.1 of 49 C.F.R., governing temporary operating authorities and approvals, provides for Commission determination of whether temporary operating authority granted under section 210a(a) of the Interstate Commerce Act is to continue in force beyond the specified expiration dates pending the determination of an application for permanent authority. Section 1101.2(f) provides that an application shall be considered to be "finally determined" when the application is denied and no further petition for agency review is allowed under the rules, or when the authority is granted and becomes effective.

But for the pending status of the Sub 2314 application, the Sub 2308 temporary authority would have long since expired. That Sub 2314 application is pending only because REA has made no attempt to prosecute it over a period of several years and, probably through oversight, it has not been dismissed for want of prosecution. That oversight should now be corrected, the Sub 2314 permanent authority application should be dismissed for want of prosecution, and the Sub 2308 temporary authority should be promptly cancelled.

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III

CONCLUSION

For the reasons stated, Petitioner respectfully requests the Commission to find that the application in MC-66562 (Sub-No. 2314) for permanent Hub authority should be dismissed for want of prosecution and that the related MC-66562 (Sub-No. 2308 TA) temporary authority should be promptly cancelled.

Respectfully submitted,

AMERICAN TRUCKING ASSOCIATIONS, INC.

Peter T. Beardsley
Robert L. James
Nelson J. Cooney
1616 P Street, N.W.
Washington, D. C. 20036

Richard R. Sigmon
618 Perpetual Building
Washington, D. C. 20004

Filed: December 1, 1975

CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading has been served, by first-class mail, postage prepaid, in accordance with the provisions of the General Rules of Practice, upon Tom Cole, REA Express, Inc., 219 East 42nd Street, New York, New York 10017.

Dated at Washington, D. C., this 1st day of December, 1975.

Peter T. Beardsley